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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,724

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (J. M. KURN AND FRANK A. THOMPSON, TRUSTEES),

Plaintiffs in Error,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION, AND OKLAHOMA PORTLAND CEMENT COMPANY,

Defendants in Error

STATEMENT AS TO JURISDICTION

Pursuant to Paragraph 1 of Rule 12 of the Supreme Court of the United States, the Appellants above named file the following statement particularly disclosing the basis upon which Appellants contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Oklahoma in the case of Oklahoma City-Ada-Atoka Railway Company and St. Louis-San Francisco Railway Company, Plaintiffs in Error, *v.* State of Oklahoma et al., Defendants in Error, No. 34,724 on the docket of said court, dated January 15, 1952 and rehearing denied May 6, 1952, and appealed from herein.

I. Statutory Provisions and Decisions Believed to Sustain Jurisdiction

The statutory provision believed to sustain the appellate jurisdiction is Section 1257, of Title 28, United States Code, which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review by appeal the final judgment, decree and decision of the Supreme Court of the State of Oklahoma, in this case: *Dahnke-Walker Milling Company* v. *C. T. Bondurant,* 257 U. S. 282, 288-90; *Sultan Railway & Timber Company* v. *Department of Labor and Industries of the State of Washington et al.,* 277 U. S. 135, 136; *Fiske* v. *State of Kansas,* 274 U. S. 380, 385; *James Stewart & Co., Inc.,* v. *Sadrakula, Adm'x.,* 309 U. S. 94, 98-99.

II. The Statutes of the State Involved

The statutes of the State of Oklahoma, the validity of which is involved, are as follows:

(a) Order No. 23,289 of the Corporation Commission of Oklahoma, dated January 19, 1950 in Cause No. 18,583 is attached hereto as Appendix "A". This Order in substance found that prior to April 28, 1941, by previous order of the Corporation Commission of Oklahoma, the rates on cement from Ada, Oklahoma to Marion, Oklahoma, a distance of

75.7 miles were assessed on a mileage basis and amounted to 12¢ per hundred pounds, while the rate to Oklahoma City from Ada, a distance of 85.1 miles was 13 cents. At that time the United States Army Air Corps was establishing a large air base 1½ miles south of Marion to which appellant, Oklahoma City-Ada-Atoka Railway Company was required to build and it was agreed between the Army and the Oklahoma City railroads that the Oklahoma City rates were to apply except on "low grade commodities such as sand, and gravel, crushed stone, slag, or brick and tile used for construction purposes." On April 28, 1941, the Corporation Commission issued its Authority B-001737-4 authorizing the railroads to issue such tariffs including the stated exception, which was accordingly done. Thereafter the railroads published such tariffs which applied the Oklahoma City rate on cement to shipments from Ada. The shipments involved in this controversy moved on such rates between February 7, 1942 and April 8, 1944.

Order No. 23,289 concluded:

> "It is therefore, ordered: That this Commission's Authority No. B-001737-4, issued on April 28, 1941, be and the same is hereby amended so as to read:
>
> > "Oklahoma railroads be and they are hereby authorized to issue, file and make effective, on one day notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at 'Marion', Oklahoma, a point on the Oklahoma City-Ada-Atoka railroad, of the rates and ratings, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as cement, sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City." Appendix A, P. 7.

(b) Order No. 23,65[illegible] of the Corporation Commission of Oklahoma, dated May 15, 1950 in Cause No. 18,583, is attached hereto as Appendix "B". This order found that the appellant railroads had overcharged Appellee, Oklahoma Portland Cement Company, 1¢ per hundred pounds on all the involved shipments, and entered judgment against appellant, Oklahoma City-Ada-Atoka Railway Company for $9,398.47, and appellant, St. Louis-San Francisco Railway Company for $570.23, each bearing interest at the rate of six per cent from April 10, 1944.

(c) Order No. 23,681 of the Corporation Commission of Oklahoma, dated May 25, 1950 in Cause No. 18,583, is attached hereto as Appendix "C". This order corrected a mistake in the calculations of the judgment against the appellant, Oklahoma City-Ada-Atoka Railway Company, by increasing it to $9,968.47, with interest at six per cent from April 10, 1944.

Since Order No. 23,289 was issued by the Corporation Commission in its legislative or rate making capacity, and the other orders were efforts of the Commission to vitalize such order, they are "legislative in character" and within the meaning of 28 U. S. C. 1257(2).

The Supreme Court of the United States has held that the term "statute" as used in 28 U. S. C. 1257(2), includes every act, legislative in character, to which the state gives sanction, such as orders of State Commissions: *Sultan Ry. & T. Co.* v. *Department of Labor and Industries*, 277 U. S. 135; *Northern Pacific Railway Company et al.* v. *Department of Public Works of Washington et al.*, 268 U. S. 39; *Bluefield Waterworks & Improvements Co.* v. *Public Service Commission*, 262 U. S. 678; *King Mfg. Co.* v. *City Council of Augusta*, 277 U. S. 100; *Lake Erie & Western Rd. Co.* v. *State Public Utilities Commission*, 249 U. S. 422; *Market Street R. Co.* v. *Railroad Commission of California*, 324 U. S. 548.

III. Date of Judgment, Denial of Petition for Rehearing

The judgment of the Supreme Court of Oklahoma appealed from was entered January 15, 1952 (not yet officially reported), copy of which is attached hereto as Appendix "D". Application of Appellants for a rehearing thereof was filed January 29, 1952 (Appendix G), and was denied by the Supreme Court of Oklahoma, May 6, 1952. The Rule of the Supreme Court, with respect to this petition for rehearing, is attached hereto as Appendix "E".

IV. Date of Petition for Appeal

Petition for appeal to this Court was presented to the Honorable Chief Justice of the Supreme Court of Oklahoma on the 24 day of July, 1952, and within ninety (90) days from the final judgment decree and decision sought to be reviewed herein, which judgment became final on May 6, 1952, when the Supreme Court of Oklahoma denied petition for rehearing.

V. Nature of the Case

The judgment of the Supreme Court of Oklahoma from which this appeal is taken was on direct appeal by Appellants to that Court from Orders No. 23,289, No. 23,659, and No. 23,681, of the Corporation Commission of Oklahoma. These Orders were issued in Cause No. 18,583 before the Corporation Commission filed therein June 8, 1944, being an application by appellee, Oklahoma Portland Cement Company seeking to recover from appellants "by way of reparation for the unreasonable and/or unlawful charges assessed, demanded and collected, a sum calculated at 1 cent per 100 pounds on the entire weight of the involved shipments" amounting to $9,968.47 for appellant, Oklahoma City-Ada-Atoka Railway Company and $570.23 for appellant, St. Louis-San Francisco Railway Company.

By order No. 2361 of the Corporation Commission of Okla-

homa, dated February 23, 1924, a mileage scale of rates on cement was adopted, which made the rate from Ada to Oklahoma City one cent higher than that to Marion, Oklahoma. In 1941 when it became known that the Army Air Corps might locate a large installation near Oklahoma City, great local effort was made to secure such location. Among the conditions imposed by the Air Corps was that the Oklahoma City freight rates should apply to the approved location some nine miles east of Oklahoma City at Marion on the appellant, Oklahoma City-Ada-Atoka Railway Company. On February 24, 1941, that appellant wrote to the Air Corps (see Appendix "A", p. 3):

> "Further agreed that rates and ratings applicable to this activity will not in any case exceed the net cash rates applicable to Oklahoma City, Oklahoma (where land grant deductions apply) except on low grade commodities such as sand and gravel, crushed stone, slag, or brick and tile used for construction purposes moving on commercial or Government bills of lading which may be handled on distance or commodity tariff."

On April 28, 1941, the Corporation Commission issued its Authority B-001737-4 to the publishing agent for the Oklahoma Railroads (See Appendix "A", p. 4), which authorized the following:

> "Oklahoma railroads be and they are hereby authorized to issue, file, and make effective, on one day's notice to the public and this Commission, necessary tariffs or supplements to tariffs, which shall provide for the application at 'Marion', Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and rating-, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City."

The tariffs were accordingly published and the cement rate to Marion shown as that to Oklahoma City, increasing the rate from Ada to Marion, one cent per hundred pounds. The results of this Authority were to increase some rates and decrease others, about equalized during the war activities.

On May 9, 1941, the tariff was published making the Oklahoma City rate applicable to cement from Ada to Marion. On February 7, 1942, appellee, Oklahoma Portland Cement Company began shipping cement to Marion from Ada, and shipped the cars of cement involved herein between that date and April 8, 1944, when the movement had largely stopped. The one cent higher rate was charged, collected, and paid by appellee, Oklahoma Portland Cement Company, without protest. Each shipment moved on a bill of lading or shipping contract in which the above rate was shown as the consideration. *Horton* v. *Tonopah & Goldfield Ry. Co.* (D.C.), 225 Fed. 406.

The cause was heard by the Commission October 6, 1944, when it was taken under advisement, oral argument had July 1, 1949, and the final orders or judgment entered on the above mentioned dates.

VI. The Ruling of the Court Bringing the Case Within the Jurisdictional Provisions Relied On

When the Corporation Commission of Oklahoma issued its Authority No. B-001737-4 (Appendix "A", p. 4), it was acting in its legislative capacity. This Authority provided:

> "Oklahoma railroads be and they are hereby authorized to issue, file and make effective on one day notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at 'Marion', Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and ratings, whether commodity or mileage, that apply to or from

Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City.

"All tariffs issued hereunder shall bear reference to this Commission's Authority B-001737-4 of April 28, 1941.

"This authority shall be in full force and effect on and after this date."

The tariffs were accordingly published effective May 20, 1941, which stated (Appendix "A", p. 4):

"Rates from or to Oklahoma City, Oklahoma, will be protected from or to Marion, Okla., on O.C.A.A. except this rule does not apply to or from Oklahoma City, Okla. (Note—will not apply on sand, gravel, crushed stone, slag, brick and tile.)"

The first shipment for appellee, Oklahoma Portland Cement Company, moved from Ada to Marion, February 7, 1942, over eight months after such rate publication, so that it was known to appellee and it acted in all respects on such knowledge. Thereafter over 1,000 cars moved and freight was paid on the basis of the published or Oklahoma City rate. The movement was over April 8, 1944.

The Corporation Commission of Oklahoma was acting in its legislative capacity, both in issuing its Authority B-001737-4, and in amending the same by the orders complained of herein. Such legislation is prospective.

City of Poteau v. *American Indian Oil & Gas Co.*, 159 Okl. 240, 18 P. (2d) 523.

Community Natural Gas Co. v. *Corporation Commission of Oklahoma, et al.*, 182 Okl. 137, 76 P. (2d) 393.

Prentiss v. *Atlantic Coast Line Rd. Co.*, 211 U. S. 210.

The shipments were in all respects completed and the freight charges paid in accordance with the published tariff without protest or objection until this proceeding was filed. Order No. 23,289 amends Authority B-001737-4 to show the word "cement" among the low grade commodities listed, which were to be excepted from the application of the Oklahoma City rate, and by virtue of such amendment made in January, 1950, the appellants are ordered to pay one cent per hundred pounds on each of said shipments completed prior to April 8, 1944.

As the rights of appellants to its lawful freight charges had long since become vested in them, the orders of the Corporation Commission of Oklahoma, divested appellants of a portion of such charges, and the judgment of the Supreme Court of Oklahoma affirming, are repugnant to the first section of the Fourteenth Amendment to the Constitution of the United States, and are void in that they deprive appellants of their property without due process.

Ettor, et al. v. *City of Tacoma, et al.*, 288 U. S. 148.

Treigle v. *Acme Homestead Association*, 297 U. S. 189.

Webster v. *Cooper*, 14 How. 488.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673.

Retrospective interpretation cannot be given to statutory enactments such as freight rate that will interfere with vested rights.

Union Pacific Rd. Co. v. *Laramie Stock Yards Co.*, 231 U. S. 190.

U. S. v. *Alabama G. S. R. Co.*, 142 U. S. 615.

Horton v. *Tonopah & Goldfield R. Co.* (D. C.), 225 Fed. 406.

The legislature itself or through its duly constituted agencies cannot impose new conditions on past contracts

to lessen their value or take any action which will operate retrospectively where such action will impair the obligation of existing contracts or interfere with rights vested as a result of the performance of such contracts. Such legislation is in violation of Section 10, Article 1, of the Constitution of the United States.

The Pacific Mail Steamship Company v. *Joliffe*, 69 U. S. 450. (2 Wall. 450).

W. B. Worthen Co. v. *Kavanaugh*, 295 U. S. 56.

City of Minneapolis v. *Minneapolis Street Railway Co.*, 215 U. S. 417.

Crump v. *Guyer et al.*, 60 Okl. 222, 157 Pac. 321.

Bagby v. *Martin*, 118 Okl. 244, 247 Pac. 404.

Wakely v. *Douglas County*, 109 Neb. 396, 191 N. W. 337.

State ex rel. Jones v. *Nolte*, 350 Mo. 271, 165 S. W. (2d) 632.

Preveslin v. *Derby & Ansonia Development Co.*, 112 Conn. 129, 151 Atl. 518.

The act of the Corporation Commission of Oklahoma in awarding a reparation or in entering a judgment against appellants on a rate it wrote in to existing tariffs to apply on shipments which had previously been completed, is an attempt to make a freight rate or a statute retroactive and is forbidden by the above provisions of the Constitution of the United States.

Arizona Grocery Company v. *Atchison, Topeka & Santa Fe Railway Co.*, 294 U. S. 370.

Sonken-Galamba Corp. v. *Union Pac. R. Co.* (C. C. A. 10th), 145 F. (2d) 808.

El Paso & S. W. R. Co. v. *Arizona Corporation Commission*, 51 F. (2d) 573.

Boynton, Atty. Gen. et al. v. *Public Service Commission of Kansas, et al.*, 135 Kan. 491, 11 P. (2d) 999.

Michigan Bell Telephone Co. v. *Michigan Public Service Commission*, 315 Mich. 533, 24 N. W. (2d) 200.

Mathieson Alkali Works, Inc. v. *N. & W. R. Co. et al.*, 147 Va. 426, 137 S. E. 608.

St. Louis-San Francisco Ry. Co. v. *State*, 155 Okl. 236, 8 P. (2d) 744.

The rate charged on the shipments was the duly authorized rate by the Corporation Commission and published as a result thereof. It was the lawful rate and the only rate appellants could charge.

Arizona Grocery Co. v. *A. T. & S. F. Ry. Co.*, 284 U. S. 370;

Woodrich v. *Northern Pac. Ry. Co.* (C. C. A. 8th), 71 F. (2d) 732;

Kanotax Refining Co. v. *A. T. & S. F. Ry. Co.*, 142 Kan. 19, 46 P. (2d) 16;

Armour Packing Co. v. *U. S.*, 209 U. S. 56;

T. R. Miller Mill Co. v. *L. & N. R. Co.*, 207 Ala. 253, 92 So. 797.

This case does not come within the scope or intent of 17 O. S. A. 121, which is:

> "The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge was made, or may thereafter be declared to be the legal rate which should have been applied to the service rendered; and, second, to whom the overcharge should be paid."

The orders of the Oklahoma Corporation Commission and the judgment and decree of the Supreme Court further take appellants' property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they are not sustained

by the evidence. *Northern Pac. R. Co.* v. *Department of Public Works of Washington*, 268 U. S. 39.

Appellee proved that it paid the one cent per hundred pounds difference between the rate published and as collected and that set by the Corporation Commission after the amendment in the orders complained of. It did not prove that it was damaged thereby.

Interstate Commerce Commission v. *U. S., ex rel.*, 289 U. S. 385;

Pennsylvania R. Co. v. *International Coal Mining Co.*, 230 U. S. 184;

Interstate Commerce Commission v. *L. & N. R. Co.*, 227 U. S. 88;

Black et ux. v. *Wickett*, 127 Okl. 53, 259 Pac. 642;

Baltimore & Ohio R. Co. v. *U. S.*, 264 U. S. 258.

VII. The Manner in Which the Federal Questions Were Raised

The federal questions presented herein were raised by the hearing before the Corporation Commission of Oklahoma, October 6, 1944, by objecting to the offer of appellee's exhibits as follows:

> "We object to the introduction of this exhibit. It goes beyond the complaint and then under the rules of this Commission, that is an attempt to seek reparation from a rate that has been established by the Commission, therefore the Commission would have no jurisdiction to grant reparations."

On the objection being overruled the record was made to save the objection throughout the offer of testimony. At the close of appellee's testimony appellants demurred to the evidence for the same reasons.

The Federal questions were further raised in the Petition in Error of appellants' in the Supreme Court of Oklahoma as follows (Appendix "F" pp. 1 & 2):

"1. Orders No. 23,289, dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, are collectively and separately contrary to law.

• • • • • • •

"3. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, are neither collectively nor separately sustained by substantial evidence.

"4. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, collectively and separately deprive the plaintiffs in error, and each of them, of their property without due process of law in violation of the Fifth and Fourteenth Articles of Amendment of the Constitution of the United States, and Section 7, Article II, of the Constitution of the State of Oklahoma.

"5. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, collectively and separately impair the obligation of previously existing contracts in violation of Section 15, Article II of the Constitution of the State of Oklahoma, and Section 10 of Article I of the Constitution of the United States."

• • • • • • •

"7. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, are collectively and separately beyond and are issued without the jurisdiction of the Honorable Corporation Commission, and said Honorable Corporation Commission has not the power to issue, make, enter or promulgate the same or any of them."

The opinion of the Supreme Court of Oklahoma referred to these questions in the opinion (Appendix "D", p. 7) by stating:

"It is further contended that the decision of the Corporation Commission in 1950, was retroactive and established a rate then which was retroactive to the time the shipments were made some years earlier. The

views we have expressed on the other points above set out appear to have fully answered this issue."

In the Petition for Rehearing (Appendix "G", p. 1) the Federal questions were again presented as follows:

> "5. Since the legal rate was charged, to amend the Authority of April 28, 1941, and the rate on cement issued and filed thereunder in 1950 after the movement had ceased for 6 years amounts to retroactive legislation, and is violative of the Constitutional rights of the railroads."

The Supreme Court after considering the petition for rehearing and brief filed in support thereof, issued its Order dated May 6, 1952, as follows:

> "It is hereby ordered that the Petition for Rehearing in the above styled and numbered case be, and the same is hereby denied.
>
> "Done by order of the Court this 6th day of May, 1952."

These federal questions were thus raised and determined by the Supreme Court of Oklahoma, and the orders of the Corporation Commission and were sustained as against their claimed invalidity under the due process clause of the Fourteenth Amendment to and the impairment of contract clause of Section 10, Article 1, of the Constitution of the United States.

VIII. The Federal Questions Involved Are Substantial

The Federal questions on this appeal are substantial for the reasons and upon the grounds stated in sub-head I, II and VI of this Statement of Jurisdiction, and for the further reasons now set out.

From the outset of the hearing before the Corporation Commission of Oklahoma the object and theory of appellants objection to the proceeding was the power of jurisdic-

tion of the Corporation Commission to go back to the time of the shipments and secure a refund of the alleged one cent excess in freight charged. The Corporation Commission accomplished this not by legal construction of the orders and rates but by amending the Authority B-001737-4 by adding the word "Cement." This the Supreme Court approved by its judgment. This was a retrospective legislative act divesting fixed and vested property rights contrary to the first section of the Fourteenth Amendment.

Ettor, et al. v. *City of Tacoma, et al.*, 228 U. S. 148;
Treigle v. *Acme Homestead Association*, 297 U. S. 189;
Webster v. *Cooper*, 14 How. 488;
Brinkerhoff-Farris Trust & Savings Co. v. *Hill*, 281 U. S. 673;
Union Pacific Rd. Co. v. *Laramie Stock Yards Co.*, 231 U. S. 190;
U. S. v. *Alabama G. S. R. Co.*, 142 U. S. 615.

This amendment took away from or impaired the executed contracts upon which each shipment moved contrary to Section 10, Article I, of the Constitution of the United States.

Columbia Railway Gas & Electric Co. v. *State of South Carolina*, 261 U. S. 236;
Seibert, Collector of Cape Girardeau County v. *U. S., ex rel., Lewis*, 122 U. S. 284;
Bank of Menden, etc. v. *Mrs. Louie Clement*, 256 U. S. 126.

The violation of these Federal rights was fundamental, and the Orders of the Corporation Commission cannot exist separate or distinct from the violation thereof. The appellants attack the validity of the Orders of the Corporation Commission and not the construction placed thereon. The Orders of the Corporation Commission and the Judgment

of the Supreme Court of Oklahoma amended the rate and then applied it to completed shipments. The final judgment was rendered determining the amount of damages without any proof thereof. These Orders, therefore, cannot become effective without the violation of appellants' constitutional rights which presents these Federal questions which are the controlling issues in this case, regardless of any independent or collateral issues raised.

Williams v. *Kaiser*, 323 U. S. 471;
Honeyman v. *Kanan*, 300 U. S. 14;
Johnson v. *Risk*, 137 U. S. 300;
Edwards v. *Elliott*, 21 Wall (U. S.) 532;
Capital City Dairy Co. v. *Ohio*, 183 U. S. 238.

Since the Supreme Court of Oklahoma has, in its opinion of January 15, 1952 (Appendix "D") upheld the validity of Orders No. 23,289, No. 23,659, and No. 23,681 of the Corporation Commission of Oklahoma, and has upheld the constitutionality of each of said orders and the jurisdiction of the Corporation Commission to enter them, and has held said Orders lawful and effective in changing the freight rates on cement on completed shipments, notwithstanding the constitutional objections which have been raised and asserted against said Orders, the validity thereof and the judgment based thereon depends upon the decision of the Federal questions thus presented, and the decision of such Federal questions cannot be avoided. The upholding of the validity of these orders and the effect of the decision and judgment based thereon will unsettle and make every rate authorized and published as a result of the Authority B-001737-4 of the Corporation Commission subject to such retroactive amendment which of itself greatly increases the importance of the decision of the Federal questions involved herein.

It is, therefore, respectfully submitted that the Supreme

Court of the United States has jurisdiction of this Appeal under Section 1257(2), Title 28, United States Code.

Dated this 24 day of July, 1952.

E. G. NAHLER,
St. Louis, Missouri;
A. J. BAUMANN,
St. Louis, Missouri;
G. W. SATTERFIELD,
Oklahoma City, Oklahoma;
BEN FRANKLIN,
Oklahoma City, Oklahoma;
H. L. HARMON,
Oklahoma City, Oklahoma,
Attorneys for Appellant,
St. Louis-San Francisco Railway Company;
R. STURGIS INGERSOLL,
Philadelphia, Pennsylvania,
Attorney for Appellant,
Oklahoma City-Ada-Atoka Railway Company;
JAMES D. GIBSON,
Muskogee, Oklahoma,
Attorney for Appellant,
Oklahoma City-Ada-Atoka Railway Company.

APPENDIX "A"

BEFORE THE CORPORATION COMMISSION, STATE OF OKLAHOMA

Cause No. 18583 Order No. 23289

OKLAHOMA PORTLAND CEMENT COMPANY, *Complainant,*

vs.

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY (J. M. Kurn and Frank A. Thompson, Trustees), *Defendants*

APPEARANCES:

For Complainants: Tom Anglin, J. H. Jarman, John Jarman.

For Defendants: Jas. D. Gibson, Harvey L. Harmon, Alvin J. Baumann.

For the Commission: C. B. Bee.

This proceeding involves rates assessed on carload shipments of cement moving from Ada, Oklahoma to Marion, Oklahoma between the dates of February 7, 1942 and April 8, 1944, and specifically involves 50 carload shipments of cement moving from Ada, via the Frisco Lines and 961 carload shipments of cement moving via the line of the OCAA Railway.

This proceeding was heard on numerous occasions before the Commission, and from the evidence and exhibits of record the following statements, findings and conclusions have been adduced.

An historical summary was prepared by Special Counsel Bee of the Commission's staff and was stipulated as evidence by parties to the proceedings.

Prior to July 11, 1922 the trackage now comprising the Oklahoma City-Ada-Atoka Railway was owned or controlled by the Missouri-Kansas-Texas Railway Company. Hereinafter the Oklahoma City-Ada-Atoka, the Missouri-Kansas-Texas and the St. Louis-San Francisco will, respectively, be generally referred to as the OCAA; the Katy and

the Frisco. At or about July, 1922 the Missouri-Kansas-Texas Railway was in receivership, and upon re-organization the trackage known as the OCAA was purchased by one H. R. Hudson, on the 5th day of January, 1924. Thereafter, the property passed to the Shawnee Interurban Railway Company, the Oklahoma City-Shawnee Interurban Railway Company, and finally to the Oklahoma City-Ada-Atoka Railway Company—the latter transfer being on September 8, 1930.

On July 11, 1922 the Oklahoma Portland Cement Company filed with this Commission a complaint against C. E. Schaff, Receiver of the Missouri-Kansas-Texas Railway Company, involving the reasonableness of rail rates on cement moving in carloads. Similar complaints were filed, either by the plaintiff herein, the Oklahoma Portland Cement Company, or by other interests, against all of the principal railroads in Oklahoma. No specific complaint was filed against the Oklahoma City-Ada-Atoka Railway Company. (This trackage then being operated by the Katy or the Receiver—see above).

On May 12, 1923, by Cause No. 5090, the Commission instituted a docket styled "In re-Investigation of Cement Rates—Order of Commission for General Investigation."

The records of the Commission do not indicate that any newspaper publication was made of the institution of Cause No. 5090. (Section 18, Article IX of the Constitution).

The Commission's docket records indicate that many of the cases filed by the Oklahoma Portland Cement Company and others, hereinbefore referred to, bearing Cause Nos. 4824, 4825, 4826, 4871, 5014 and 5089 were consolidated with Cause No. 5090, supra.

The records of the Commission show that on July 26, 1923 Cause No. 5090 was heard jointly with the Interstate Commerce Commission in connection with the latter's Docket No. 14936, and the hearing record was closed.

On February 23, 1924 this Commission issued its Order No. 2361, in Cause No. 5090. The docket does not indicate that said order was published in a newspaper, etc. (Section 18, Article IX of the Constitution).

Order No. 2361, Supra, prescribed a mileage scale of

rates for application on cement moving in carloads from all points, other than Dewey, Oklahoma, to all points in the State of Oklahoma. Three material paragraphs of Order No. 2361, supra, are quoted below:

> "It is ordered that (railroads named), defendants herein, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before May 14, 1924, and thereafter to abstain from publishing, demanding or collecting for the transportation of cement, in carloads, between points within Oklahoma, by intrastate route, rates which exceed those hereinafter prescribed."
>
> • • • • • • •
>
> "That the Commission retain jurisdiction of the subject-matter herein involved and the parties hereto for such further order or orders as may be found necessary."
>
> • • • • • • •
>
> "That this order shall continue in full force until the further order of this Commission."

Without describing the mileage scale of rates it is stipulated of record that if the mileage scale of rates were lawfully in effect at the time these shipments moved from Ada to Marion, Oklahoma that the specific mileage scale would have produced a rate of 12 cents per 100 pounds for a haul of 75.7 miles.

It is further stipulated of record that after the issuance of Order No. 2361 the property now known as the Oklahoma City-Ada-Atoka Railway, between Oklahoma City and Ada, Oklahoma, was acquired by the Oklahoma City-Shawnee Interurban Railway Company, and later acquired on May 26, 1924 by the Oklahoma City-Ada-Atoka Railway Company, and that adoption notices, adopting rules, tariffs and regulations which had theretofore been filed with the Oklahoma Corporation Commission as covering this line, and that such tariffs thus became the tariffs of the Oklahoma City-Ada-Atoka Railway Company.

It is further stipulated that at all times since May 6, 1924

the OCAA has owned and operated the line of railroad, from Oklahoma City to Ada, here involved.

It is further stipulated that between the dates of September 20, 1921 and April 28, 1937 "Marion" was a station on the line of the property here involved, and was lawfully shown by tariffs to be 75.7 miles from Ada, Oklahoma.

It is further stipulated that on April 28, 1937 the OCAA abandoned, by tariff publication, "Marion" as a station on this line.

In the early part of February, 1941 officers of the United States government (Army) were investigating as to the establishment * of an Air Depot in the vicinity of Oklahoma City, and as a result of such investigation on February 24, 1941 the OCAA filed a proposal with the Chief of the Air Corps of the United States Army agreeing to re-establish "Marion" as a station at approximately the original location, to build certain trackage (about 1½ miles) from the said OCAA rail line at or near Marion to serve the proposed government air depot. A portion of said tender was:

> "Further agreed that rates and ratings applicable to this activity will not in any case exceed the net cash rates applicable to Oklahoma City, Oklahoma (where land grant deductions apply) except on low grade commodities such as sand and gravel, crushed stone, slag, or brick and tile used for construction purposes moving on commercial or Government bills of lading which may be handled on distance or commodity tariff."

It is stipulated that this tender became an agreement between the government, on the one hand, and the OCAA, on the other hand.

Prior to April 28, 1941 J. R. Peel, acting under a Power of Attorney from all Oklahoma railroads, including the defendants herein, filed a petition with this Commission asking for approval of the foregoing agreement, and on April 28, 1941, a letter was addressed to said J. R. Peel,

* The name of the Oklahoma City-Ada-Atoka Railway Company was not included within the list of railroads referred to in the paragraph above cited.

signed by two members of the Commission, reading in part as follows:

"Arrangements have been entered into by the Oklahoma railroads, on the one hand, and the United States Government, on the other hand, whereby freight shipments, to and from this location 'will not in any case exceed the net cash rates applicable to Oklahoma City * * * except on low grade commodities * * * used for construction purposes * * * which may be handled on distance or commodity tariff.'

"Oklahoma Railroads have now requested authority from this Commission to amend certain tariffs in furtherance of the application of rates to this activity, and propose to amend Mileage Table No. 1-h, an intrastate issue, by adding a new item (58) which will provide that rates from or to Oklahoma City will be protected from or to 'Marion', except on carload shipments of low grade commodities *such as* sand, gravel, crushed stone, slag, brick and tile, and except shipments moving locally between Oklahoma City and 'Marion'; and that Southwestern Lines' Tariffs 55-Q and 83-G, Oklahoma intrastate tariffs, will likewise be amended to provide that rates applicable from or to Oklahoma City will also apply from or to 'Marion', as above indicated.

"There is no railroad station now located between Oklahoma City and the new station 'Marion', and the practical effect of those tariff amendments is to put 'Marion' within the railroad tariff limits of Oklahoma City, except on shipments to and from 'Marion', on the one hand, and to and from Oklahoma City on the other hand.

"As above stated, this is a United States Government activity and the general public will have little interest, directly, in the rates applicable to and from such activity, and the arrangements having been made by the Government, on the one hand, and the railroads, on the other, this Commission is of the opinion, under the provisions of the Constitution of this State, that such arrangements should be approved.

"Oklahoma railroads be and they are hereby author-

ized to issue, file, and make effective on one day notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at 'Marion', Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and ratings, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City.

"All tariffs issued hereunder shall bear reference to this Commission's Authority B-001737-4 of April 28, 1941.

"This authority shall be in full force and effect on and after this date."

It is further stipulated that on May 20, 1941 the station of Marion was re-established by Item 58 of Supplement 5 to South-Western Lines' Mileage Table No. 1-H, and that said item contained the following language:

"Rates from or to Oklahoma City, Oklahoma, will be protected from or to Marion, Okla. on O. C. A. A. except this rule does not apply to or from Oklahoma City, Okla. (Note—will not apply on sand, gravel, crushed stone, slag, brick, and tile.)"

It is further stipulated that between the dates of February 7, 1942 and April 8, 1944 the complainants shipped from Ada to Marion, 961 cars of cement, routed via the OCAA and 50 cars of cement routed via the Frisco and OCAA, and that upon each of these cars a rate of one (1) cent per 100 pounds was charged, assessed and collected over and above the rate that would have been applicable had the mileage scale of rates prescribed by Order No. 2361 in Cause No. 5090, supra, been applied, and that the difference in money collected by reason of said difference in application of rates amounted to $9,968.95 on cars routed via the OCAA, and $570.23 on cars routed via the Frisco and OCAA, and an additional amount of $112.89, being the

amount of tax, Federal and State, charged and assessed on these shipments.

The rate for the future is not involved, as effective April 9, 1944, the railroads re-established a specific rate from Ada to Marion, equivalent to the rate that was in effect prior to the abandonment of the station at Marion. The railroads later attempted to cancel the application of such rate, but the tariff was suspended by the Commission in Cause No. 18634, and that cause is still pending with the increased rate still suspended.

Several questions are involved in this proceeding.

1. Section 18, Article IX of the Constitution delegates authority to this Commission to conduct two classes of proceedings for the fixation of rail rates:

(a) What may be called a specific rate
(b) What may be called a general rate.

Section 18 provides, in part:

> "Before the Commission shall prescribe or fix any rate, * * * directed against any one or more companies by name, * * * the company or companies to be affected by such rate, * * * shall first be given, by the Commission, at least ten (10) days notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence to be heard thereon, * * * and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, * * * shall first be published in substance not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, * * * and from such general order * * * made by the Commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be pub-

lished in each subsequent annual report of the Commission."

2. Did the Commission maintain authority in the issuance of order No. 2361 to issue the authority issued herein designated "Authority B-001737-4"?

3. Did the authority above designated in its language "except on carload shipments of low grade commodities" include shipments of cement as one of the excepted commodities?

4. It is a recognized rule of tariff construction that where there is no station the rate that is applicable to the next more distant station will be applied. Before these shipments moved the OCAA had abandoned the Station of Marion, and shipments then moving would have been subject to the next more distant rate, Oklahoma City, which rate was applied. The authority, B-001737-4, authorized the re-establishment of Marion as a station, as well as authorizing the application of Oklahoma rates except on low grade commodities, etc.

Petitioner's Contentions

Petitioner contends that Order No. 2361, supra, was a general order, and at the time of its issuance it was directed to the Missouri-Kansas-Texas Railway (receiver), and that the line here in question, now owned by the OCAA, was a part and portion of the properties of the M-K-T Railway, and that the order remains in full force and effect against all parts of the line of the then M-K-T Railway (receiver), regardless of the method of disposition of the line.

Petitioner further contends that the Interstate Commerce Commission in the companion case to Docket 5090, being ICC Docket No. 14936, referred to cement as a low grade commodity, and that the report of this Commission, which, in effect, adopted the order of the Interstate Commerce Commission growing out of Docket 14936, did thereby designate cement as a low grade commodity.

Petitioner further contends that the Commission was re-

quired to give shippers notice of any order that might be issued in these proceedings.

Petitioners' Contentions may be summarized:

That Order No. 2361 was a general order fixing a mileage scale of rates applicable on cement in carloads; that said order applied, when issued, to the segment of track involved in the movement of this cement from Ada to Marion; that said Order No. 2361 has never been cancelled or superseded (other than by general rate increases) by any lawful action of the Commission, and that the lawful rate in effect during the entire time of the movement here in controversy was subject to the application of the rates named in such mileage scale (subject to authorized increases), and that any charges in excess thereof were unjust and unlawful.

Defendant's Contentions

It is rather difficult to set out the defendant's position as stated on oral argument, and by answer filed to the original complaint. The original answer filed on June 21, 1944 was a general denial, but on argument defendants' counsel was not clear as to whether the authority of the Commission issued April 21, 1941, authorizing the restriction of the increases on low grade commodities such as sand, gravel, crushed stone, slag, brick and tile included cement or whether cement was to have a different treatment.

Findings

Numerous questions may be involved in this proceeding that are purely legal questions, and would appear to be primarily for a court's decision.

Section 18, Article IX authorizes this Commission to issue two classes of orders, to-wit: general orders and specific orders. A specific order is one directed to carriers by name, whereas, a general order must flow from a proposal that has been given newspaper publicity, and thereafter the order itself must be published in a newspaper of general circulation published in the county in which the Capitol is located, and thereafter must be published in each Annual Report of the Commission, so long as it is effective. Order No. 2361,

supra, was directed to carriers by name. It did not flow from a previous newspaper publication, nor was the order itself published in a newspaper as required for general orders by Section 18, Article IX of the Constitution, and therefore, it becomes a question of law as to whether such order continued in effect as to segments of a line that was owned by a specific carrier named in the order after such segment of line had been dis-connected from the ownership and management of the carrier to which the specific order had been directed. The Commission does not care to pass upon this question.

So far as this proceeding is concerned it may be disposed of by a discussion of the authority issued by the Commission on the 28th day of April, 1941, designated as Authority No. B-001737-4 without a finding as to whether the Commission was authorized by Article IX of the Constitution to issue such an order.

The finding of the Commission preceding the authority in question reads:

> "With the exception of the materials necessary to construct the buildings and equipment and material necessary in grading and paving the site, the great majority of shipments to and from this activity will be for account of the United States Government."

The arrangement for the treatment of Marion as a portion of the Oklahoma City rate area, from a transportation standpoint, was an arrangement between the railroads and the United States Government, and the authority sought from this Commission was to amend certain tariffs to make Marion a portion of the Oklahoma City rate area except on carload shipments of low grade commodities to be used in the construction of buildings and in grading and paving the site.

Treating the preliminary statement in the authority that shipments to and from this activity would be for the account of the United States Government, with the exception of the materials necessary to construct the building and in grading and paving the site, with the application of the carriers that the authority sought was not to be applicable on carload

shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile the Commission finds that the authority granted, which excepted the foregoing commodities, was intended to cover those commodities necessary to construct the buildings and in grading and paving the site. Brick was a necessary commodity for the construction of buildings and could have been used in paving the site; whereas, sand, gravel, crushed stone and slag were intended not only for buildings, but as materials necessary in grading and paving the site. In the use of the term "paving" cement would be a necessary ingredient to use with sand, gravel and crushed stone, and could have been a necessary commodity in forming a base for brick in paving the site.

The Commission therefore finds that Authority B-001737-4, issued on the 28th day of April, 1941, was intended to include "Cement", as a low grade commodity and as a commodity which was a material necessary in the grading and paving the site and in constructing the buildings, and therefore Authority No. B-001737-4 was not intended and did not authorize the rail carriers to charge and collect on shipments of cement destined to Marion, Oklahoma, when originating at Ada, Oklahoma, the contemporaneously effective rate that was applicable on similar shipments of cement when destined to Oklahoma City, Oklahoma.

Treating this matter as a nunc pro tunc proceedings, this Commission hereby finds that Authority No. B-001737-4 issued on the 28th day of April, 1941, should be amended to restrict the word "cement" as a low grade commodity, and that such authority should read as of its effective date, April 28, 1941, as follows:

> "Oklahoma railroads be and they are hereby authorized to issue, file and make effective, on one day notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at 'Marion', Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and ratings, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low

grade commodities such as cement, sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City."

It is, therefore, ordered: That this Commission's Authority No. B-001737-4, issued on April 28, 1941, be and the same is hereby amended so as to read:

"Oklahoma railroads be and they are hereby authorized to issue, file and make effective, on one day notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at 'Marion', Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and ratings, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as cement, sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City."

This order shall be in full force and effect on and after this the 19th day of January, 1950.

CORPORATION COMMISSION OF OKLAHOMA,

(S.) REFORD BOND,
Chairman;

(S.) RAY O. WEEMS,
Vice-Chairman;

(S.) RAY C. JONES,
Commissioner.

Attest:
TOM MCMURRAY.

APPENDIX "B"

M. V. K., O. & G. O., C. A. A.

May 22, 1950

Legal Department

BEFORE THE CORPORATION COMMISSION, STATE OF OKLAHOMA

Cause No. 18583

Order No. 23659

OKLAHOMA PORTLAND CEMENT COMPANY, *Complainant*,

vs.

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY (J. M. Kurn and Frank A. Thompson, Trustees), *Defendants*

Appearances:

For Complainants: Tom Anglin, J. H. Jarman, John Jarman.

For Defendants: Jas. D. Gibson, Harvey L. Harmon, Alvin J. Baumann.

For the Commission: C. B. Bee.

This proceeding involves rates assessed on carload shipments of cement moving from Ada, Oklahoma to Marion, Oklahoma. The proceedings were heard before the Commission and Order No. 23289 was issued herein on the 19th day of January, 1950, and the proceedings are before the Commission on petition of the complainant for rehearing.

The issues, history and resume of the evidence are specifically dealt with in Order No. 23289 and will be repeated herein only to the extent necessary for the consideration hereinafter given.

A stipulation was filed covering the greater portion of the evidence and shows: 961 carloads of cement from Ada

to Marion via the line of the OCAA, one of the defendants, and 50 carloads moved jointly via the Frisco railway, the other defendant and the OCAA.

The distance from Ada to the station called Marion is 75.7 miles. The stipulation shows the rates that would apply had a certain order of the Commission been effective on the line of the OCAA at the time of movement and that the only difference between the parties is a freight rate charge of one (1) cent per 100 pounds on the weight of the shipments above referred to.

It is further stipulated that in the year 1923, as a result of Cause No. 5090, this Commission issued its Order No. 2361 setting up a mileage scale of rates applicable on cement, in carloads, and that said order, except as herein otherwise discussed, and subject to certain general increases in rates that have been authorized, is still in force and effect. It is further stipulated that said Order No. 2361 was issued against the Missouri, Kansas & Texas railroad and its receivers, and that at the time of the issuance of said order the trackage now owned and operated by the Oklahoma City-Ada-Atoka railway was a part of the line of the MK & T railway, supra; that the line in question went through several sales and finally became a portion of the line of the OCAA railroad on September 8, 1930 and was so owned and operated at the time of the movement of these shipments.

It is further stipulated of record that from time to time the respective successors of the MK & T railroad and its receivers, including the defendant, OCAA, filed with the Commission adoption notices of tariffs theretofore issued.

The record further shows that on the 28th day of April, 1941 this Commission issued its Authority No. B-001737-4 upon a petition of one J. R. Peel, who was acting upon Powers of Attorney from all Oklahoma railroads, including the defendants herein, in requesting such authority order.

The authority in question provided in part:

> "Oklahoma railroads be and they are hereby authorized to issue, file, and make effective on one day notice to the public and this commission, necessary tariffs or supplements to tariffs which shall provide for the

application at 'Marion,' Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and ratings, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, Brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City."

Prior to the time of the issuance of the above authority the Station of Marion had been abandoned by the OCAA railroad, but with the issuance of the above named authority the Station at Marion was re-established, and a specific rate was named to Marion as applicable on cement, moving in carloads, from Ada, Oklahoma, which rate was the rate that would have applied under the mileage scale of rates prescribed in Order No. 2361, supra, for the distance Ada to Oklahoma City, and was one (1) cent per 100 pounds higher than the rate that would have applied from use of the mileages from Ada, Oklahoma to Marion, Oklahoma.

That upon all of the shipments involved herein the railroads not only assessed and collected rates one (1) cent higher, per 100 pounds, than the mileage scale applied to the distance Ada, Oklahoma to Marion, Oklahoma, but in addition thereto collected a Federal Transportation Tax of three percent of the transportation charges actually assessed and collected.

Order No. 2361, supra, was issued under provisions of Section 18, Article IX of the Constitution which authorizes the issuance of orders by the Commission. Said Order No. 2361 was directed to specific railroads by name, and the substance of said Order was not published prior to the hearing thereon, nor was the Order itself published as a newspaper of general circulation published in the county where the Capital is located, as required by the provisions of Section 18, Article IX as to general orders. Likewise the Authority Order No. B-001737-4, dated April 28, 1941, was not published as above indicated, nor was a public hearing had before the issuance thereof.

Order No. 23289, supra, issued on the 19th day of January, 1950, herein reformed said Authority B-001737-4 as of its

original date of issuance so as to specifically name cement as one of the commodities to be excluded from the permission therein granted.

Contention of parties

The complainant contends that said Authority B-001737-4 is void and of no effect for the reason that no notice was given and no hearing had which would authorize the issuance and making effective of said authority, because said authority provides that "Oklahoma railroads be and they are hereby authorized xxx" and that no railroads contemplated by said order are named. Complainant further contends that because said Authority No. B-001737-4 was addressed to no specific railroad by name it was a general order, and there should have been a publication prior to and after the issuance of said order as required by Section 18, Article IX of the Constitution for a general Order.

The principal contention of complainant is that Order No. 2361, supra, was the applicable and controlling order governing the assessment and collection of freight charges by the defendants for the transportation of cement, in carloads, from Ada to Marion at the time of the movements here involved—that the order was directed to the MK & T and its receivers, and was therefore binding on the privies of the MK & T. That the OCAA deraigned its title to the line of road here in question from and through the MK & T and its receivers, and therefore, it is, as a matter of law, in privity with the MK & T and its receivers. 50 C. J. S. Sec. 756; *Hine* vs. *Board of County Commissioners,* 108 Pac. (2d) 112.

The defendants contend that Order No. 2361, supra, was a specific order, not a general order. That the substance of the order as a notice was not published prior to the hearing, nor was the order published at length before it went into effect. That the Oklahoma City-Ada-Atoka Railway Company was not in existence at the time of the entering of the order, hence, no notice could have been served upon it as required in a special order. The defendants further contend that the adoption notices, stipulated of record, can in no way be held to constitute appearance in the cause or

causes resulting in Order No. 2361. That the adoption notices are clear in their intent to adopt tariffs, rules, notices, concurrences, tariff agreements, divisions, authorities, Powers of Attorney or other instruments whatsoever "as if the same had been originally filed and posted by it." That adoption notices applied only to voluntary acts of the predecessors in ownership and not to involuntary proceedings resulting in orders against the carriers specifically named in orders which resulted from contested hearings.

Issues

Apparently, two questions are before the Commission at this time. First: Is Authority No. B-001737-4 null and void?

Second: What was the lawful rate applicable on carload shipments of cement from Ada, Oklahoma to Marion, Oklahoma, at the time of the movement of the shipments involved herein?

Findings

As to the first proposition: Order No. 2361, supra, retained jurisdiction in the Commission to issue such other of further orders as the facts might warrant.

The provisions of Section 18, Article IX, as to specific orders, insures that the respondent or defendant railways shall have at least ten days notice of the time and place when they shall be called upon to defend any proposed action of the Commission. The petition of said carriers, asking the issuance of a specific order, waives the requirement of notice. When jurisdiction in the matter has been retained by the Commission the Commission is empowered to issue such further or other orders as the facts may warrant and as the Commission deems just. The petitions of the carriers which lead to the issuance of Authority No. B-001737-4 are of record in this proceeding, and they definitely and distinctly show that the carriers were seeking authority for relief from certain orders of the Commission in behalf of the establishment of a government plant as a necessity of war, and the authority sought exempted low grade commodities which were to be used "for construction purposes". More specifically, the relief sought was as to

the general commodities, "with the exception of the materials necessary to construct the buildings and equipment and material necessary in creating and paving the site x x x".

The Commission holds that it had the authority to amend Order No. 2361, and that in re-consideration it had the authority to reform said order so as to state the facts as intended by the record at the time of the issuance of said authority B-001737-4. To the extent that Order No. 23289, supra, reforms said Authority No. B-001737-4, said Order No. 23289 should be and is hereby re-affirmed and the petition for re-hearing, to that extent, should be and is hereby denied.

As to the second issue:

From a thorough consideration of the evidence the Commission finds that Order No. 2361, issued in Cause No. 5090 on the 23rd day of February, 1924, was a valid order against the Missouri, Kansas & Texas Railway Company and Chas. E. Schaff and Byron F. Babbitt, Receivers; and against the Missouri-Kansas-Texas Railroad Company; that the Oklahoma City-Ada-Atoka Railway Company, defendant herein, acquired that portion of the line of the two companies, above named, which extended from Ada, Oklahoma to Oklahoma City, Oklahoma; That said Oklahoma City-Ada-Atoka Railway Company filed lawful adoption notices of tariffs, rules, notices, concurrences, etc. that had theretofore been filed by its predecessors with respect to that portion of the line from Ada, Oklahoma to Oklahoma City, Oklahoma via said Station of Marion, Oklahoma. That by such adoption the tariffs that had been issued by said predecessor companies which conformed to the mileage scale of rates prescribed by said Order No. 2361, supra, because the tariffs of the Oklahoma City-Ada-Atoka Railway with respect to all parts of said line between Ada, Oklahoma and Oklahoma City, Oklahoma: and that at all times since the acquisition of said line by the Oklahoma City-Ada-Atoka railroad it has owned and operated the trackage from Ada, Oklahoma to Oklahoma City, Oklahoma under the tariffs promulgated by the predecessor lines in compliance with Order No. 2361, supra and the general increase amendments thereto.

That on May 20, 1941, the Oklahoma City-Ada-Atoka Railway Company re-established and published as a station on its line—Marion, Oklahoma—and that such station has so remained at all times involved in this proceeding, and that such station of Marion is 75.7 miles from Ada, Oklahoma.

The Commission further finds that the petition filed by J. R. Peel, as an authorized attorney for said Oklahoma City-Ada-Atoka Railway Company and said St. Louis-San Francisco Railway Company (J. M. Kurn & Frank A. Thompson, Trustees), intended to and did exempt from said petition the commodity of cement, as such commodity was a necessary commodity in the construction of the buildings and paving of the site that was referred to in said petition; and further finds that in the issuance of said Authority No. B-001737-4 on the 28th day of April the Commission intended to and by the use of the term "low grade commodities" did exempt cement from the authority therein granted, and therefore, that said Order No. 2361, supra, had been the lawful basis for the ascertainment of rates to be used in the assessment of charges for the transportation of cement, carloads, by railroads from Ada, Oklahoma to Marion, Oklahoma, at all times between the 28th day of April, 1941, and the present date.

The Commission further finds that the defendant, the Oklahoma City-Ada-Atoka Railway Company transported 961 carload shipments of cement moving from Ada, Oklahoma to Marion, Oklahoma between the dates of April 28, 1941 and April 10, 1944 and on each of said shipments an excess charge of one (1) cent per 100 pounds was assessed and collected; and that the St. Louis-San Francisco Railway Company (J. M. Kurn & Frank A. Thompson, Trustees) transported, between the same dates, 50 carload shipments of cement moving from Ada, Oklahoma, in connection with the line of the Oklahoma City-Ada-Atoka railroad to Marion, Oklahoma, and that upon each of said shipments an excess charge of One (1) cent per 100 pounds was assessed and collected. That the 961 carloads of cement moving via the lines of the Oklahoma City-Ada-Atoka Railway Company had a net weight of 99,908,175 pounds; and

that the 50 carload shipments of cement moving from Ada, Oklahoma via the St. Louis San Francisco Railway Company in connection with the Oklahoma City-Ada-Atoka Railway Company had a net weight of 5,702,260 pounds, (Ex. 8), and therefore, said defendants have unlawfully charged and collected the sums of $9,968.47 from the complainant, the Oklahoma Portland Cement Company. Of the foregoing amount the Commission finds that the sum of $9,398.24 was unlawfully collected for shipments moving via the line of the Oklahoma City-Ada-Atoka Railway Company and $570.23 was unlawfully collected for shipments moving via the joint lines of the St. Louis-San Francisco Railway Company and the Oklahoma City-Atoka-Railway Company.

The Commission further finds that said excess or overcharge in rates was unreasonable, unjust and unlawful and is due and should be refunded as hereinafter set out.

Order

It is, therefore, Ordered: that the petition for re-hearing filed herein by the complainant, to the extent that it asks that Order No. 23289 issued herein on the 19th day of January, 1950, be held null and void is hereby denied.

It is further Ordered: that Order No. 23289, issued herein on the 19th day of January, 1950, to the extent that said Order No. 23289 reformed Authority No. B-001737-4 issued April 28, 1941, be and the same is hereby re-affirmed.

It is further Ordered: Adjudged and Decreed that the defendants, the Oklahoma City-Ada-Atoka Railway Company and the St. Louis-San Francisco Railway Company be and they are hereby adjudged and required to pay the sum of $9,968.47, being overcharged in freight collected from the Oklahoma Portland Cement Company on shipments of cement involved herein; that the above amount the sum of $9,398.24 shall be paid by the Oklahoma City-Ada-Atoka Railway Company and that the sum of $570.23 shall be paid by the St. Louis-San Francisco Railway Company and the Oklahoma City-Ada-Atoka Railway Company.

It is further Ordered, Adjudged and Decreed that said amounts heretofore set out as overcharge in freight rates

were unlawfully collected from the complainant for the transportation of cement involved herein and said amounts shall draw interest at six (6) percent from April 10, 1944.

It is further Ordered, Adjudged and Decreed that the defendants, the Oklahoma City-Ada-Atoka Railway Company and the St. Louis-San Francisco Railway Company shall pay the above specified sums to the Corporation Commission of Oklahoma, and said amounts to be disbursed as required by law, by said Commission to the complainant.

This order shall be in full force and effect on and after this the 15th day of May, 1950.

CORPORATION COMMISSION
OF OKLAHOMA,

Signed REFORD BOND,
Chairman;

RAY O. WEEMS,
Vice-Chairman;

RAY C. JONES,
Commissioner.

Attest:

TOM MCMURRAY,
Secretary.

CBB:B.

APPENDIX "C"

BEFORE THE CORPORATION COMMISSION, STATE OF OKLAHOMA

Cause No. 18583

Order No. 23681

OKLAHOMA PORTLAND CEMENT COMPANY, *Complainant,*

vs.

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (J. M. KURN and FRANK A. THOMPSON, Trustees), *Defendants*

Correction Order

By order No. 23659 issued in the above styled cause on the 15th day of May, 1950 the Commission found that there had been an overcharge, in excess of the lawfully applicable rate, amounting to 1 cent per 100 pounds. By order therein the Commission decreed that the sum of $9,968.47 be paid to the Commission account said unlawful overcharge, and further decreed that $9,398.24 of this amount should be paid by the Oklahoma City-Ada-Atoka Railway Company and $570.23 be paid jointly by the Oklahoma City-Ada-Atoka Railway Company and the St. Louis-San Francisco Railway Company.

The Commission's attention has been directed to the fact that while the foregoing figures were based upon Exhibit No. 8 filed of record that the sum to be paid jointly by the Frisco-OCAA Lines had been deducted from in lieu of being added to the amount to be paid individually by the Oklahoma City-Ada-Atoka Railway Company.

There was filed of record, and which appears on page 326 of the Transcript of Record filed in the Supreme Court in this proceeding an agreement that upon the basis of the unlawful charge being assessed at 1 cent per 100 pounds the amount to be paid jointly by the Frisco Lines and the Oklahoma City-Ada-Atoka Railway Company, in addition to the amount to be paid jointly, was to be $9,968.95.

Therefore, the Commission finds that the order issued herein on the 15th day of May, 1950 should be amended so

as to properly state the actual unlawful collection that had been made.

Order

It is, therefore, ordered: that the order herein issued on the 15th day of May, 1950, bearing No. 23659 be and the same is hereby amended so as to provide and read:

It is further ordered: Adjudged and decreed that the defendants, the Oklahoma City-Ada-Atoka Railway Company and the St. Louis-San Francisco Railway Company be and they are hereby adjudged and required to pay the sum of $10,539.18 being overcharge in freight collected from the Oklahoma Portland Cement Company on shipments of cement involved herein; that of the above amount the sum of $9,968.47 shall be paid by the Oklahoma City-Ada-Atoka Railway Company and that the sum of $570.23 shall be paid by the St. Louis-San Francisco Railway Company and the Oklahoma City-Ada-Atoka Railway Company.

It is further ordered, adjudged and decreed that said amounts heretofore set out as overcharge in freight rates were unlawfully collected from the complainant for the transportation of cement involved herein and said amounts shall draw interest at six (6) percent from April 10, 1944.

It is further ordered, adjudged and decreed that the defendants, the Oklahoma City-Ada-Atoka Railway Company and the St. Louis-San Francisco Railway Company shall pay the above specified sums to the Corporation Commission of Oklahoma, and said amounts to be disbursed, as required by law, by said Commission to the complainant.

This order shall be in full force and effect on and after this the 25th day of May, 1950.

CORPORATION COMMISSION OF OKLAHOMA,

(S.) REFORD BOND,
Chairman;

(S.) RAY O. WEEMS,
Vice-Chairman;

(S.) RAY C. JONES,
Commissioner.

Attest:
TOM MCMURRAY.

APPENDIX "D"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,724

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (J. M. KURN and FRANK A. THOMPSON, TRUSTEES), *Plaintiffs in Error,*

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION, and OKLAHOMA PORTLAND CEMENT COMPANY, *Defendants in Error*

Syllabus

An authority issued by the Corporation Commission approving an arrangement between the railroads and the United States Government, regarding the shipping of certain commodities in the State of Oklahoma, which authority was promulgated without compliance with the provisions of Sec. 18, Art. IX, of the Oklahoma Constitution is not a general order and does not supercede, as to shippers not parties to the agreement, a general order theretofore made fixing freight rates.

Appeal from a Judgment of the Corporation Commission

Appeal by Oklahoma City-Ada-Atoka Railway Company and St. Louis-San Francisco Railway Company, (J. M. Kurn and Frank A. Thompson, Trustees), from a judgment of the Corporation Commission determining the amount of refund due on freight charges in excess of the lawful rate and directing payment of the same to Oklahoma Portland Cement Company.

Affirmed

E. P. Nahler, and A. J. Baumann, St. Louis, Missouri, G. W. Satterfield, Ben Franklin, and H. L. Harman, Oklahoma City, for Plaintiff in Error, St. Louis-San Francisco Railway Company, (J. W. Kurn and Frank A. Thompson, Trustees).

James D. Gibson, Muskogee, for Plaintiff in Error, Oklahoma City-Ada-Atoka Railway Company.

W. T. Anglin, Holdenville, and Jarman & Jarman, Oklahoma City, for Defendant in Error, Oklahoma Portland Cement Company.

Mac Q. Williamson, Attorney General, for Defendant in Error, State of Oklahoma, Corporation Commission.

BINGAMAN, *J.*:

The defendant in error, Oklahoma Portland Cement Company, as complainant, recovered a judgment before the Oklahoma Corporation Commission against the plaintiffs in error, Oklahoma City-Ada-Atoka Railway Company, and St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, Trustees), for the refund of freight collected on cement shipments in excess of the rate such Corporation Commission held was the lawful rate in force at the time such charge was made. The railroads appeal.

The amount of cement shipped by the cement company over the roads in question, during the period of time involved, is not disputed. The freight charged at the time of shipment was at the rate the railroads involved claim was the lawful rate in force at that time. Judgment was rendered on the basis of the rate contended for by the cement company. There is no dispute as to the amount of the recovery in the event judgment is for the cement company.

The rate involved is on cement between Ada and Marion, Oklahoma. Marion is a station on the Oklahoma City-Ada-Atoka Railway main line, slightly south and a few miles east of Oklahoma City, Oklahoma. Although established as a station for many years it had fallen into disuse and was not reactivated until the Air Force Base, now known as Tinker Field, was established in the same vicinity.

Prior to July 11, 1922, the trackage now comprising the Oklahoma City-Ada-Atoka Railway was owned or controlled by the Missouri-Kansas-Texas Railway Company. On January 5, 1924, such trackage was purchased by one, H. R. Hudson, and finally the property was transferred to

Oklahoma City-Ada-Atoka Railway Company, on September 8, 1930.

On July 11, 1922, the Oklahoma Portland Cement Company filed with the Corporation Commission a complaint against the Receiver of the Missouri-Kansas-Texas Railway Company, involving the reasonableness of rail rates on cement moving in car loads. Similar complaints were filed, either by this cement company or by other interested persons, against all the principal railroads in Oklahoma. These various matters were consolidated for hearing by the Corporation Commission and on February 23, 1924, the Commission issued its order Number 2361, prescribing a mileage scale of rates for cement moving in car load lots, to all points in Oklahoma, other than Dewey. This mileage scale of rates established a rate of 12 cents per one hundred pounds from Ada to Marion, Oklahoma. After the adoption of this rate and on May 6, 1924, the Oklahoma City-Ada-Atoka Railway Company began operating the trackage in question. On May 26, 1924, such railway company duly adopted the tariffs and rates theretofore filed with the Corporation Commission covering this line. The OCAA carried Marion as a station at this tariff rate in its traffic publication until April 28, 1937, at which time it abandoned such station in its tariff publication.

Thereafter, on February 24, 1941, the OCAA wrote the U. S. Air Corps a proposal agreeing to construct additional trackage at the site and "further agreed that rates and ratings applicable to this activity will not in any case exceed the net cash rates applicable to Oklahoma City, Oklahoma (where land grant deductions apply), except on low grade commodities, such as sand and gravel, crushed stone, slag, or brick and title, used for construction purposes, moving on commercial or government bills of lading which may be handled on distance or commodity tariff." This proposal became an agreement between the Government and the OCAA. All the Oklahoma railroads, then acting through their legal representative, filed a petition with the Oklahoma Corporation Commission asking for approval of this rate agreement. Acting on this request and on April 28, 1941, the Corporation Commission addressed a letter to

the representative of the Oklahoma railroads acknowledging that it was advised of the proposed establishment of the army bomber repair plant at the Marion station, and of the agreement between the railroads and the United States Government. The letter further acknowledged the railroads' request for authority to amend their tariffs to comply with this agreement and then provided.

> "There is no railroad station now located between Oklahoma City and the new station, Marion, and the practical effect of those tariff amendments is to put Marion within the railroad limits of Oklahoma City, Oklahoma, except on shipments to and from Marion, on one hand, and to and from Oklahoma City, on the other hand. As above stated, this is a United States Government activity and the general public will have little interest directly, in the rates applicable to and from such activity, and the arrangements having been made by the Government, on the one hand, and the railroads, on the other, this Commission is of the opinion, under the provisions of the Constitution of this state, that such arrangements should be approved. Oklahoma railroads be and they are hereby authorized to issue, file, and make effective, on one days notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at Marion, Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and ratings, whether commodity or mileage, that arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between Marion and Oklahoma City.
>
> All tariffs issued hereunder shall bear reference to this Commission's authority B-001737-4 of April 28, 1941. This authority shall be in full force and effect on or after this date."

Following this the O. C. A. A., published its tariff announcing that:

> "Rates from or to Oklahoma City, Okla., will be protected from or to Marion, Okla., on the O. C. A. A.,

except that this rule does not apply to or from Oklahoma City, Okla. Note—Will not apply on sand, gravel, crushed stone, slag, brick tile or chatt."

Based on this tariff the OCAA and Frisco charged the Oklahoma City rate of 13 cents per hundred on cement from Ada to Marion, instead of the former mileage rate of 12 cents.

The Corporation Commission found its Authority No. B-001737-4 issued on April 28, 1941, was an approval of the arrangement between the railroads and the United States Government, and was for the purpose of putting the Oklahoma City rates in force at Marion, with the exception of certain items of low grade commodities, to be used in the construction of buildings and in grading and paving the site. Among those enumerated were sand, gravel, crushed stone, slag, brick and tile, and the Commission found that the use of the term "paving" in connection with these other terms in the government-railroad negotations, included cement, as a necessary ingredient to be used with the sand, gravel and crushed stone. The Corporation Commission therefore found that such authority did not authorize the carriers to charge and collect the Oklahoma City rate on cement shipped from Ada to Marion, Oklahoma.

The plaintiffs in error complain this is a suit for damages or reparation. The authority of the Commission is determined by 17 O. S. 1941, Sec. 121, which provides:

> "The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation—charges an amount for any service—, in excess of the lawful rate in force at the time such charge was made, —.

In St. Louis-S. F. Ry. Co. et al., v. State et al., 155 Okla. 236, 8P 2d 744, we held, that the Corporation Commission was without power to award reparations for payments on freight shipments where the charges, when made, were in accordance with the rates therefore fixed by the Corporation Commission. The answer to the jurisdictional question therefore depends upon whether a charge has been made in excess of the fixed rate.

The fixed rate at the time of the shipments in question was undoubtedly the 12 cent rate contended for by the cement company, unless the same was fixed at a higher rate by authority B-001737-4, supra. This authority was the validation of an agreement made between the United States Government and the railroads in question. Its express purpose as shown by the letter from the railroad to the Chief of the Air Corps was to establish rates which would not exceed the rate to Oklahoma City. Its apparent purpose was to procure a reduction in rates rather than an increase. And, as further shown by the letter to the Air Corps, low grade commodities, such as sand and gravel, crushed stone, slag, or brick and tile, used for construction purposes, were specifically excepted from the order, and they were to continue to move on distance or commodity tariff. This authority was for the purpose of permitting this agreement to take effect. It was not an order fixing rates within the contemplation of Article IX, Sec. 18, Oklahoma Constitution. It contains no findings on which such rate orders are made, as required in *Midland Valley R. Co. et al.* v. *State*, 24 Okla. 817, 104 P 1086. It was not based upon notice, as is required of a general rate order under Art. IX, Sec. 18, Oklahoma Constitution. We therefore conclude it was not a rate fixing order, but a permissive authority to carry out the special wartime agreement made between the Government and the railroads.

On the other hand the Corporation Commission found that cement was a low grade commodity, such as sand, gravel, crushed stone, slag, brick and tile, and was therefore in the exceptions to Authority B-001737-4. That cement is a low grade commodity for shipping purposes appears established.

> "Cement is a low grade commodity which is usually loaded to the maximum capacity of the cars used." 87 I. C. C. R. P. T. 462.

The carriers cite and rely on Application of Central Airlines, Inc., 199 Okla. 300, 185 P 2d 919, as supporting its construction that, "low grade commodities, such as sand, gravel, crushed stone, slag, brick and tile" limited the low

grade commodities to those specifically specified. The case cited construes Section 34, Art. IX of the Oklahoma Constitution, wherein the language, "the term transportation company shall include" was held limited to the particular ones therein specified. That case is clearly distinguishable from the one at bar.

It will be noted also that the authority from the Commission does not specifically except such commodities from the agreement, but provides that "such arrangements MAY be restricted as to shipments of low grade commodities." Apparently therefore this authority leaves the question of the application of the Oklahoma City rate on such shipments open to the possibility of further agreement between the Government and the railroads.

We therefore conclude the Corporation Commission did not err in holding the commodity, cement, was not included in its Authority B-001737-4.

It is also contended that the O. C. A. A., was not a party to the earlier proceedings establishing the 12 cent rate and is therefore not bound by it. Its predecessor in the operation of the trackage involved was a party to such proceedings, and after the OCAA acquired the trackage it published and adopted these rates. The position of the carrier on this issue is untenable. If such holding was adopted the carrier would be in the position of transporting a commodity on which no rate had been established. Under authority of *A. T. & S. F. R. Co.* v. *State*, 85 Okla. 223, 206 P 236, in such a situation the Corporation Commission would have authority to compel a refund of any excess charge.

The carriers next contend that even if the 13 cent rate was erroneous that it was published in the tariffs of the railroads and therefore, as the published rate, was the legal rate. If it was such legal rate it is their contention the Corporation Commission is without jurisdiction under the 17 O. S. 1941, Sec. 121. Numerous authorities construing the published rates of carriers operating under the Interstate Commerce Commission are cited. We are not here, however, dealing with published rates under the Interstate Commerce Commission. The Constitution of Oklahoma, Article IX,

Sec. 18, requires the Corporation Commission to fix the rates. 17. O. S. 1941, Sec. 121, vests the Corporation Commission with power to order refunds in the event the rate charged is in excess of the unlawful rate in force at the time such charge was made. This statute obviously could refer only to the lawful rate fixed by the Corporation Commission.

Complaint is also made that the cement company has based its contracts and bids with the Government on the 13 cent freight rate which it has been required to pay, and that therefore it has sustained no actual loss in the premises and should not be entitled to recover from the carriers. The cement company has paid the excessive rate. The fact that it used such rate in computing its bids would appear to be no defense available to the carriers.

It is further contended that the Decision of the Corporation Commission in 1950, was retroactive and established a rate then which was retroactive to the time the shipments were made some years earlier. The views we have expressed on the other points above set out appear to have fully answered this issue.

Finally it is urged the cement company cannot recover because it participated in the acts complained of and therefore has sustained no injury. In support of this position the case of *Mangum Electric Co.* v. *Border*, 101 Okla. 64, 222 P 1002, is cited. That was a *tort* case in which one participant sought to recover damages against the other. There is no evidence here that the cement company assented to the rate charged. It was not notified and did not participate in the proceedings which caused the company to change the rate. It simply paid the charge which was exacted from it in order to move the freight. We fail to see how that could be any such voluntary participation in the transaction as would bar its recovery of any illegal freight charged.

The judgment of the Corporation commission is affirmed. Arnold, C. J., Halley, V. C. J., and Welch, Corn, Davison and Johnson J. J., concur; Gibson and O'Neal, JJ., dissent.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, Plaintiff in Error,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION, ET AL., Defendants in Error

Order

It is hereby ordered that the votes shown on the opinion filed in the above styled and numbered cause on January 15, 1952, be changed to read as follows:

Concur: Arnold, C. J., Welch, Corn, Davison and Johnson, JJ.

Dissent: Halley, V. C. J., Gibson and O'Neal, JJ.

Done by order of court this 6th day of May, 1952.

(S.) Ben Arnold, Chief Justice.

No. 34,724

OKLAHOMA CITY-ADA-ATOKA RAILWAY CO. ET AL.

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION AND OKLAHOMA PORTLAND CEMENT COMPANY

GIBSON, J., dissenting.

I cannot concur in the majority opinion.

This is an action filed by Oklahoma Portland Cement Company against the two railway companies (now plaintiffs in error) for refund of alleged excessive freight charged and collected on carload shipments of cement from Ada to Marion, Oklahoma. Judgment for Portland and railroads appeal.

The proceeding is brought and jurisdiction asserted under Tit. 17 O. S. 1941, sec. 121. Construed in *A. T. & S. F. Ry. Co.* v. *State*, 85 Okla. 223, 206 Pac. 236, holding

Commission to be vested with authority to compel a refund of excess charged above the lawful rate.

There are several important dates in the history of this case. February 23, 1924, Order 2361 was issued by the Corporation Commission prescribing a mileage scale of rates for cement moving in car lots. May 26, 1924, the rate was established at 12¢ per 100 pounds Ada to Marion. February 24, 1941, Oklahoma City-Ada-Atoka Railway Company submitted its letter to United States Air Corps. This proposal was accepted by the Government. April 28, 1941, Commission Authority B-001737-4 issued establishing the station of Marion on basis of Oklahoma City rates, with the exceptions noted therein; June 10, 1941, in compliance with the Commission's order tariffs were published fixing the Oklahoma City rate of 13¢ for cement to Marion. February 7, 1942, Portland began shipping cement and paying freight at 13¢ April 8, 1944, Portland's last shipment. June 8, 1944, complaint filed by Portland claiming a refund of 1 cent per 100 pounds. October 6, 1944, Commission heard evidence and took the cause under advisement. Nothing further was done until the cause was set for oral argument on July 1, 1949. On January 19, 1950, the Commission amended the Authority by its order 23289 specifically including "cement", in the specified commodities excepted in the Authority B-001737-4. On June 15, 1950, Commission entered judgment against Oklahoma City-Ada-Atoka Railway Company for $9398.47, and against Frisco for $570.23, with interest at 6% from April 10, 1944.

The letter agreement of February 24, 1941, states:

> "Further agreed that rates and ratings applicable to this activity will not in any case exceed the net cash rates applicable to Oklahoma City, Oklahoma (where land grant deductions apply) *except on low grade commodities such as sand and gravel, crushed stone, slag, or brick and tile used* for construction purposes moving on commercial or Government bills of lading which may be handled on distance or commodity tariff."

On February 28, 1941, the Commission issued its Authority B-001737-4, which provides:

> "Oklahoma railroads be and they are hereby authorized to issue, file, and make effective on one day's notice

to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at "Marion", Oklahoma a point on the Oklahoma City-Ada-Atoka Railroad of the rates and ratings, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City."

The tariffs were accordingly published and cement was not included in the low grade commodities excepted from the application of the Oklahoma City rate to Marion.

Defendant railroads invoke the rule of construction "ejusdem generis", and cite Application of Central Airlines, Inc., 199 Okla. 300, 185 Pac. (2d) 919. Therein we quoted from 59 C. J. 980:

> "So words of general import in a statute are limited by words of restricted import immediately following and relating to the same subject."

Numerous other cases are cited in contending that the meaning of "low grade commodities" in the Authority is limited to the things "sand, gravel, crushed stone, slag, brick and tile", and that "cement" not being named is not included with the commodities which were excluded from the application of the Oklahoma City rates.

There is merit to this contention. Application of Central Airlines, Inc., supra; Ex Parte Amos, 112 so. 289 (Fla.); City of Tulsa v. Southwestern Bell Telephone Co., 75 Fed. (2d) 343; Ex Parte Carson, 33 Okla. Cr. 198, 243 Pac. 260.

The commodities sand, gravel, crushed stone, slag, brick and tile named in the exception are largely competitive with each other. Their manner of shipping and the use of cars in their transportation are similar. Under the evidence they can be shipped in open cars and left exposed to weather conditions without damage. Not so with cement, which must be shipped in closed cars and protected from the weather. Surely, when considering shipping rates, and considering the extra cars necessary to its transportation, cement should not be classified within the excepted commodities in the

absence of a statute or order declaring such inclusion. Its inclusion should not be by implication. Therefore, in my opinion, the rule of construction known as "ejusdem generis" should be held to apply in this case.

Defendant railroads further say that the action of the Commission in attempting to amend its order establishing rates in 1941 by the order complained of entered in 1950 is in effect retroactive legislation, violating the carriers' constitutional rights which had long since become vested. I agree with this argument.

In Authority B-001737-4, April 28, 1941, the Commission authorized Oklahoma railroads to issue, file and make effective on one day's notice to the public and to the Commission necessary tariffs or supplements to tariffs, which shall provide for the application at Marion, Oklahoma, of the rates and ratings, whether commodity or mileage that apply to or from Oklahoma City with the exception above noted. This was done, and the tariffs published provided a rate of 13¢ to and from Oklahoma City. The United States Government, the Commission, the railroad carriers, the shippers, and all who dealt in shipments to Marion on this project, accepted and recognized that rate as the legal rate. It was the legal rate because it was the only rate that the carriers could charge. It is not contended that they charged more. During the construction of the Tinker Field project, and between February 1942 and April 1944 Portland shipped more than 1000 cars of cement and paid the freight at the 13¢ rate. No complaint was made by Portland until the filing of the complaint herein on June 8, 1944.

In Community Natural Gas Co. v. Corporation Commission, 182 Okla 137, 76 Pac, (2d) 393, this court, quoting from Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 53 L. ed. 150, said:

> "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by sec. 720.

* * * * * * *

judicial inquiry investigate, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore, is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals."

Plaintiff in error says:

"The theory for this inhibition is stated in Michigan Public Service Commission, 315 Mich. 533, 24 N.W. (2d) 200, at 206, 209, where it is said:

" 'The impropriety and invalidity of the order of December 28, 1944, on this ground (i.e., that it is in effect retroactive) should be clear. For the State to prescribe utility rates, forbid the utility to charge any other rates, and then say that those rates may be declared unjust and unreasonable as applied to executed transactions shocks the conscience. Under such a rule how could the utility order its affairs? If an order may be made retroactive for one year, why not for any period (in the absence of a statute of limitations) and what then becomes of the commitments the utility may have made in the belief that the sums it has earned and collected belong to it? Reason, common fairness and precedent combine to establish the rule that the charter of a commission's powers should not be construed to permit it to impugn its own legislative acts with retroactive effect unless the statutes affirmatively require such a construction."

The Michigan court further said:

"The principal matter to be determined in this appeal is the earliest date from which reparations may be allowed on account of any claims made in this proceed-

> ing. • • • A commission-made rate furnished the applicable law for the utility and its customers until a change is made by the commission. The utility was entitled to rely on the order of 1931 (which originally fixed the rate) until August 30, 1935 (the date of the commission's order fixing lower rates), but thereafter might be liable for reparations."

Up to the time of the decision in this case in May, 1950, there had been no reduction in the rate, which was filed and published under the Authority of April 28, 1941. The effect or net result of reducing the rate on cement (without an application or hearing on reduction) was accomplished, however, by Commission Order No. 23289, which declared "cement" to be included in the commodities excepted in the Authority. This order was not entered until January 19, 1950.

• • • • • • •

order 23289 is an amendment to Authority B-001737-4. If by any reasoning it can be said that Order 23289 operated to reduce the rate established under the Authority from 13¢ to 12¢, then certainly the judgment rendered could be a refund only of the excessive charges made from and after January 19, 1950, the effective date of the Order making the reduction.

Art. IX, Sec. 18 of the Oklahoma Constitution specifically granted to the Commission the power to amend its rates, charges, classifications, rules, etc. In its final order the Commission held that it had authority to amend Order No. 2361.

The carriers asked the Commission to amend its tariffs so that the rates applicable at Marion would not exceed the rates applicable to Oklahoma City. Authority B-001737-4 was intended as an amendment to the former rates established. The new rate on cement was published. "The parties could not by contract or otherwise vary this rate." Missouri, etc., R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690.

> "As the carrier, shipper and consignee are bound by the published schedule of rates, the court is like-

wise bound thereby in determining the rights and liabilities of the Parties."

Woodrich v. Northern Pac, Ry. Co., 71 Fed. (2d) 732.

The rate collected here was the rate published under the Authority of the Commission by virtue of its power to amend existing rates. It was the authorized rate and the only one in the tariffs. It was the only rate on cement which could be collected. The charge made was not a rate "in excess of the lawful rate in force at the time such charge was made", as provided in Tit. 17 O. S. 1941, Sec. 121, under which Portland's claim is asserted.

"A commission made rate furnished the applicable law for a utility and its customers until a change is made by the public utility commission."

Chelteham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 25 Atl. (2d) 334.

"A freight rate which has been filed, approved, and published by the Railroad Commission is the lawful rate, *even though unreasonable,* and is the only rate which the carrier can charge without violating the statutes and penal laws; and, where a carrier has charged such rates, the shipper is not entitled to recover as for any excess charges, nor for penalties accruing under code 1907, Secs. 5553, 5554."

T. R. Miller Mill Co. v. Louisville & N. R. Co., 92 So. 797 (Ala.).

"Where carrier merely collected intrastate rate authorized by State Corporation Commission, Commission held without authority to order reparation, though rate prescribed and charged was found excessive.

"Provision authorizing Corporation Commission to require reparation for excessive charges applies only where carrier has enforced rates in excess of those prescribed by Commission."

El Paso & S. W. R. Co. v. Arizona Corporation Commission, 51 Fed. (2d) 573.

"• • • The carrier's right to the published rate at the time it was collected was its property. Can the carrier now be compelled to refund any part of it in view of the constitutional inhibition that no person shall be deprived of his property without due process of law?"

State ex rel. v. Public Service Commission of Kansas, 11 Pac. (2d) 999.

In the last mentioned case the question was answered in the negative, as to transactions had prior to the passage of the Act but was upheld as to transactions had after its effective date.

The majority opinion is predicated on the theory that rates on cement were fixed pursuant to Order 2361, made February 3, 1924, and have stood without change. Authority of April 28, 1941, is not recognized as an amendment to any former rate fixing order although it was adopted by the Commission and new tariffs were drawn pursuant to the order of the Commission and such new tariff fixed certain rates and applied the Oklahoma City rates to Marion. It was intended as an amendment to former rates. It was acted upon by carriers and shippers under the published rates. It is said that the Authority contains no findings, as required, and was not based on required notice, and was therefore not an order fixing rates within the contemplation of Art. IX, Sec. 18 of the Oklahoma Constitution.

But this same section defines the powers and duties of the Commission, authorizes the Commission to establish rates and grants power to amend or alter such rates, from time to time.

The Commission is presumed to have acted lawfully and to have performed such duties as necessary under law for it to promulgate the order and its rate, when fixed, is deemed as prima facie just, reasonable and correct. Atchison, T. & S. F. R. Co. v. State, 82 Okla. 289, 200 Pac, 232. Therefore the rate established pursuant to the Authority was the authorized rate until amended or altered, and the charges made by the carriers were lawful charges so long as they did not exceed the newly authorized rate.

The foregoing authorities concern the remedy sought,

and these interpretations of the law with reference to the remedy are not in conflict with the constitutional provision.

I am of the opinion that the Commission had no jurisdiction to enter its judgment for refund on any shipments made prior to January 19, 1950, when by its order No. 23289 it included "cement" as one of the common commodities excepted under the Authority.

I am of the further opinion that the relief sought is based on a claim for damages by reason of a tort allegedly committed by the carriers. Portland contends that it has been damaged to the extent of the difference between the published and collected rate and the rate which it says was the legal rate. It seeks recovery of an illegal and excessive charge made by the carriers. Defendants in error in their brief so state.

> "The recovery of an illegal charge made by a carrier under statute is on tort committed by carrier in making such charge."
>
> Central of Georgia Ry. Co. v. West Virginia Pulp & Paper Co., 92 Fed. (2d) 892.
>
> Lewis-Simas-Jones Co. v. Southern Pacific Company, 283 U. S. 654, 75 L. Ed. 1333.

Since the action was grounded on tort and not on contract, the claim was unliquidated until reduced to judgment. The order allowed 6% interest for nearly six years prior to the date of its entry. Such judgments bear interest from the date on which they are rendered. Tit. 15 O. S. 1941, Sec. 274.

While there is no separate assignment of error involving the question of interest allowed on the judgment, plaintiffs in error attack the whole judgment, as hereinbefore shown, and of course it is contended that the whole judgment, and each and every part thereof, including interest, is erroneous.

I can see no legal reasons for sustaining the Commission's judgment. Certainly good morals do not require it. Portland, in pricing its products to the consumer, did so upon the assumption that 13¢ per 100 pounds of cement was the correct rate. It has lost nothing. To sustain the judg-

ment is merely to increase Portland's profits from the transaction.

I respectfully dissent.

Justice O'Neal concurs in these views.

APPENDIX "E"

RULE OF THE SUPREME COURT OF OKLAHOMA RELATING TO REHEARINGS

28. Rehearings: Application for a rehearing in any cause, unless otherwise ordered by the Court, shall be made by petition to the court, signed by counsel, and filed with the Clerk, within fifteen (15) days from the date on which the opinion in the cause is filed. No oral argument on petition for rehearing shall be allowed except upon order of the Court. No motion or application for rehearing or review will be allowed after the denial of a petition for rehearing without leave of the Court. The Clerk shall not file any such motion or application except by leave of the Court first obtained. No petition for rehearing shall be filed or considered without proof of service.

APPENDIX "F"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34724

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (J. M. Kurn and Frank A. Thompson, Trustees), *Plaintiffs in Error*,

vs.

STATE OF OKLAHOMA; CORPORATION COMMISSION, and OKLAHOMA PORTLAND CEMENT COMPANY, *Defendants in Error*

Petition in Error

The Oklahoma City-Ada-Atoka Railway Company, a corporation, and St. Louis-San Francisco Railway Com-

pany, a corporation, plaintiffs in error, complain of the State of Oklahoma, the Corporation Commission of the State of Oklahoma, and the Oklahoma Portland Cement Company, defendants in error, for that the said defendants in error issued and caused to be issued in Cause No. 18,583 before the Corporation Commission of the State of Oklahoma, Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, and entered judgment by the consideration of the Corporation Commission of the State of Oklahoma against the plaintiffs in error in the above entitled cause before said Corporation Commission of the State of Oklahoma, wherein the Oklahoma Portland Cement Company was complainant, and the plaintiffs in error herein were respondents. The original case-made, record of said case, together with all evidence introduced before said Corporation Commission, duly certified by said Corporation Commission of the State of Oklahoma, is hereto attached marked Exhibit "A", and made a part of this petition in error. The said Oklahoma City-Ada-Atoka Railway Company, a corporation, and St. Louis-San Francisco Railway Company, a corporation, plaintiffs in error, aver that there is error in said record and proceedings in this, to-wit:

1. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, are collectively and separately contrary to law.

2. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, are collectively and separately contrary to the evidence.

3. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 19, 1950, and No. 23,681 dated May 25, 1950, are neither collectively nor separately sustained by substantial evidence.

4. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, collectively and separately deprive the plaintiffs in error, and each of them, of their property without due process of law in violation of the Fifth and Fourteenth Articles of Amendment of the Constitution of the United States, and Section 7, Article II, of the Constitution of the State of Oklahoma.

5. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, collectively and separately impair the obligation of previously existing contracts in violation of Section 15, Article II of the Constitution of the State of Oklahoma, and Section 10 of Article I of the Constitution of the United States.

6. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950, and No. 23,681 dated May 25, 1950, are collectively and separately without authority of law.

7. Orders No. 23,289 dated January 19, 1950; No. 23,659 dated May 15, 1950 and No. 23,681 dated May 25, 1950, are collectively and separately beyond and are issued without the jurisdiction of the Honorable Corporation Commission, and said Honorable Corporation Commission has not the power to issue, make, enter or promulgate the same or any of them.

WHEREFORE, plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught, and the judgment may be rendered in favor of the plaintiffs in error and against the defendants in error, and that the plaintiffs in error be restored to all rights that it has lost by the renditon of such judgment and for such other relief as to the court may seem just.

(S.) E. G. NAHLER,
(S.) A. J. BAUMANN,
St. Louis, Missouri;
(S.) G. W. SATTERFIELD,
(S.) BEN FRANKLIN, and
(S.) H. L. HARMON,
Oklahoma City, Oklahoma;
Attorneys for Plaintiff in Error, St. Louis-San Francisco Railway Company.
(S.) JAMES D. GIBSON,
Muskogee, Oklahoma,
Attorney for Plaintiff in Error, Oklahoma City-Ada-Atoka Railway Company.

APPENDIX "G"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,724

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (J. M. Kurn and Frank A. Thompson, Trustees), Plaintiffs in Error,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION, and OKLAHOMA PORTLAND CEMENT COMPANY, Defendants in Error

Petition for Rehearing

Come now the defendant below, plaintiffs in error herein, and respectfully petition this Honorable Court to grant a rehearing in this cause, and to withdraw its opinion filed herein on January 15, 1952, and to reverse the award and judgment of the Corporation Commission upon which said judgment was entered.

For grounds of this rehearing plaintiffs in error allege that the opinion rendered in this cause on January 15, 1952 is erroneous for the following reasons:

1. The law of the case as stated in the syllabus of the court in the opinion decides a moot question.

2. The holding of the opinion and the syllabus are contrary to Section 18 of Article IX of the Constitution of Oklahoma, and would make all rates fixed as a result of the authority of April 28, 1941, uncertain and subject to present litigation.

3. The rate on cement issued, filed and made effective as authorized by the Authority of April 28, 1941, was the legal rate, and the only rate that could be collected until the Commission "altered or amended" it.

4. The opinion is contrary to all existing rules of statutory and rate construction.

5. Since the legal rate was charged, to amend the Authority of April 28, 1941, and the rate on cement issued and filed

thereunder in 1950 after the movement had ceased for 6 years amounts to retroactive legislation, and is violative of the Constitutional rights of the railroads.

6. Since this is an action to recover "an illegal and excessive rate" charged, plaintiff has failed to prove the damages and in any event is not entitled to 6% interest from the date of shipment.

Wherefore, premises considered, plaintiffs in error attach hereto their brief in support of their Petition for Rehearing in this cause, and pray that a rehearing be granted, and that upon such rehearing the opinion filed in this cause on January 15, 1952, be withdrawn, and that the judgment and award of the Corporation Commission be set aside.

(S.) E. G. NAHLER,
(S.) A. J. BAUMANN,
St. Louis, Missouri,
(S.) G. W. SATTERFIELD,
(S.) BEN FRANKLIN, and
(S.) H. L. HARMAN,
Oklahoma City, Oklahoma,
Attorneys for Plaintiffs in Error,
St. Louis-San Francisco Railway Company.
(S.) JAMES D. GIBSON,
Muskogee, Oklahoma,
Attorney for Plaintiff in Error,
Oklahoma City-Ada-Atoka Railway Company.

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AUG 29 1952
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 304

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY AND SAINT LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Appellants,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION, AND OKLAHOMA PORTLAND CEMENT COMPANY,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OF APPELLEE, OKLAHOMA PORTLAND CEMENT COMPANY, OPPOSING JURISDICTION AND MOTION TO DISMISS APPEAL.

J. H. JARMAN,
JOHN JARMAN,
STEPHEN H. HART,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 304

No. 34,724

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (J. M. KURN AND FRANK A. THOMPSON, TRUSTEES), *Appellants,*

vs.

STATE OF OKLAHOMA: CORPORATION COMMISSION, AND OKLAHOMA PORTLAND CEMENT COMPANY, *Appellees*

STATEMENT OF APPELLEE, OKLAHOMA PORTLAND CEMENT COMPANY, OPPOSING JURISDICTION AND MOTION TO DISMISS APPEAL.

Comes now the appellee, Oklahoma Portland Cement Company, and files its statement opposing the jurisdiction of the Supreme Court and moves the Court to dismiss the appeal herein for the reasons hereinafter stated.

Statement

On February 23, 1924, the Corporation Commission of Oklahoma, sitting in its legislative capacity, entered its Order No. 23631, Cause No. 5090, prescribing a mileage scale of rates for intrastate shipments of cement within the State of Oklahoma (c. m. 331-47. Included in Tr.). Under said scale of rates, the rate to be applied to any given shipment of cement would depend on the distance the shipment was to be transported. On shipments of the distance from Ada, Oklahoma to Marion, Oklahoma the rate is 1¢ per hundred pounds less than on shipment of cement from Ada, Oklahoma to Oklahoma City, Oklahoma, which is 9.4 miles farther. Said order No. 23631 has been in force at all times since its adoption.

In the early part of 1941, officers of the United States Government were considering establishing an Air Depot at a point on the line of the Oklahoma City-Ada-Atoka Railway Company near the station, Marion. Conferences were held with the railroads of Oklahoma and an agreement was reached by the railroads and the Officers representing the United States Government, the terms of which were set out in a letter written by the Oklahoma City-Ada-Atoka Railway Company, acting for itself and for the other railroads, addressed to the Office of the Chief of Air Corps United States Army, February 24, 1941 (c. m. 258-59. Included in Tr.) in which the railroad agreed to build at its cost a side track to the site of the air depot and further agreed as follows:

> "Further agreed that rates and ratings applicable to this activity will not in any case exceed the net cash rates applicable to Oklahoma City, Oklahoma (where land grant deductions apply) except on low grade commodities such as sand and gravel, crushed stone, slag, or brick and tile used for construction purposes mov-

ing on commercial or Government bills of lading which may be handled on distance or commodity tariff."

On April 28, 1941, without any notice being given, the Commission in keeping with the agreement of the parties, issued its order, termed "Authority B-001737-4." (c. m. 265-68. Included in Tr.) approving the agreement, which reads as follows:

Authority B-001737-4 Establishing the station 'Marion' on basis Oklahoma City rates with exceptions.

"J. R. Peel, Publishing Agent,
Southwestern Freight Bureau,
St. Louis, Missouri.

"This Commission is advised that the United States Government, in furtherance of National defense, has or is arranging for the establishment of an Army Bomber Repair Plant at a point slightly south and approximately nine miles east of Oklahoma City, Oklahoma. That said plant will be located close to the tracks of the Oklahoma City-Ada-Atoka Railway's main line, and that arrangements have been perfected whereby side track facilities will be provided from such plant. This Commission is further advised that this location, for a railroad standpoint, will be designated at 'Marion', which name heretofore applied to a station in this same vicinity.

"With the exception of the materials necessary to construct the buildings and equipment and material necessary in grading and paving the site, the great majority of shipments to and from this activity will be for account of the United States Government.

"Arrangements have been entered into by the Oklahoma railroads, on the one hand, and the United States Government, on the other hand, whereby freight shipments, to and from this location, 'will not in any case exceed the net cash rate applicable to Oklahoma City * * * except on low grade commodities * * * used

for construction purposes • • • which may be handled on distance or commodity tariff'.

"Oklahoma railroads have now requested authority from this Commission to amend certain tariffs in furtherance of the application of rates to this activity, and purpose to amend Mileage Table No. 1-H, and intrastate issue, by adding a new item (58) which will provide that rates from or to Oklahoma City will be protected from or to 'Marion', except on carload shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick, and tile, and except shipments moving locally between Oklahoma City and 'Marion'; and that Southwestern Lines Tariffs 55-Q and 83-G, Oklahoma intrastate tariffs will likewise be amended to provide that rates applicable from or to Oklahoma City will also apply from or to 'Marion', as above indicated.

"There is no railroad station now located between Oklahoma City and the new station 'Marion', and the practical effect of those tariff amendments is to put 'Marion' within the railroad limits of Oklahoma City, Okla., except on shipments to and from 'Marion', on one hand, and to and from Oklahoma City, on the other hand.

"As above stated, this is a United States Government activity and the general public will have little interest directly, in the rates applicable to and from such activity, and the arrangements having been made by the Government, on the one hand, and the railroads, on the other, this Commission is of the opinion, under the provisions of the Constitution of this State, that such arrangements should be approved.

"Oklahoma railroads be and they are hereby authorized to issue, file, and make effective, on one day's notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at 'Marion', Oklahoma, a point on the Oklahoma City-Ada-Atoka Railroad, of the rates and ratings, whether commodity or mileage, that apply to or from

Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile and on all shipments moving locally between 'Marion' and Oklahoma City.

"All tariffs issued hereunder shall bear reference to this Commission's Authority B-001737-4 of April 28, 1941.

"This authority shall be in full force and effect on and after this date."

Thereafter and between the dates, February 7, 1942, and April 8, 1944, appellee shipped over the lines of appellants a large number of cars of cement from Ada to Marion, Oklahoma and the appellants charged, demanded and collected from appellee on each of said shipments the rate prescribed by the mileage scale of rates from Ada to Oklahoma City, on the theory that such was permissable under Authority B-001737-4 above referred to. Appellee contended that the Oklahoma City rate was not applicable to the shipments of cement from Ada to Oklahoma City, on the theory that such was permissable under Authority B-001737-4 above referred to. Appellee contended that the Oklahoma City rate was not applicable to the shipments of cement from Ada to Marion, Oklahoma because cement belongs to that class of "low grade commodities used for construction purposes" that was excepted from the application of the Oklahoma City rate, as provided by the agreement between the railroads and the United States Government and the approval of that agreement by the Commission through Authority B-001737-4.

Subsequently appellee brought suit against appellants before the Corporation Commission of Oklahoma, sitting as a court of law, in which it sought judgment for a refund of the excessive 1¢ per hundred pounds in freight exacted

and collected by appellants over and above the legal rate prescribed by order No. 23631. The Commission was not sitting as a rate making body or as a legislative body in said action, but as a court of record and its acts were judicial. The orders entered by the Commission in this case were judicial orders or judgments and not legislative.

The Statute of Oklahoma governing this action is as follows:

"The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge was made, or may thereafter be declared to be the legal rate which should have been applied to the service rendered; and, second, to whom the overcharge should be paid."

"Upon ascertaining the amount of overcharge due from any public service corporation, person or firm, the Corporation Commission shall have authority to render judgment against such public service corporation, person or firm, for the amount of such over-charge that may have been collected from the public in violation of any legal rate, or order of the commission, if necessary to insure the prompt payment of the same to the commission. Such judgment shall be a lien upon the property of the public service corporation, person, or firm, and shall be collected in the same manner that fines and penalties imposed by the Corporation Commission are now authorized to be collected by law, and, when collected, shall be paid immediately by the commission to the parties to whom it is due." (Laws 1913, ch. 10, Secs. 1 & 2) 17 Oklahoma Statutes Annotated, Secs. 121 & 122.

Article IX, Sec. 34, Constitution of Oklahoma defines "public service corporation", as a term which shall include all transportation and transmission companies.

Appellee contended that the applicable rate on the shipments in question was that prescribed by the mileage scale of rates under Order No. 23631 for the distance from Ada to Marion, Oklahoma; that cement is a low grade commodity used for construction purposes and belongs to the class of low grade commodities that was excepted by the agreement between the railroads and the United States Government and the approval thereof by the Commission in its Authority B-001737-4 from the application of the Oklahoma City rate on shipments to Marion, Oklahoma. Appellants contended that the exception in said contract and Authority did not except cement from the application of the Oklahoma City rate, and that the only low grade commodities excepted from the Oklahoma City rate were those specifically named in the exception.

After the evidence was concluded and upon full hearing the Commission entered its judgment No. 23289 on January 19, 1950, (Appendix "A" to Petition for Appeal) in which the Commission, sitting as a court of record, found as follows:

"Treating the preliminary statement in the authority that shipments to and from this activity would be for account of the United States Government, with the exception of the materials necessary to construct the buildings and in grading and paving the site, with the application of the carriers that the authority sought was not to be applicable on carload shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile the Commission finds that the authority granted, which excepted the foregoing commodities, was intended to cover those commodities necessary to construct the buildings and in grading and paving the site. Brick was a necessary commodity for

the construction of buildings and could have been used in paving the site; whereas, sand, gravel, crushed stone, and slag were intended not only for buildings, but as materials necessary in grading and paving the site. In the use of the term 'paving' cement would be a necessary ingredient to use with sand, gravel and crushed stone, and could have been a necessary commodity in forming a base for brick in paving the site."

"The Commission therefore finds that Authority B-001737-4, issued on the 28th day of April, 1941 was intended to include "Cement", as a low grade commodity and as a commodity which was a material necessary in the grading and paving the site and in constructing the buildings, and therefore Authority No. B-001737-4 was not intended and did not authorize the rail carriers to charge and collect on shipments of cement destined to Marion, Oklahoma when originating at Ada, Oklahoma, the contemporaneously effective rate that was applicable on similar shipments of cement when destined to Oklahoma City, Oklahoma."

The Court—Commission—in said judgment No. 23289 specifically found and held that Authority B-001737-4 "did not authorize the rail carriers to charge and collect on shipments of cement destined to Marion, Oklahoma, when originating at Ada, Oklahoma, the contemporaneouly effective rate that was applicable on similar shipments of cement when destined to Oklahoma City, Oklahoma." The Commission then in said order and finding included what is termed, a "nunc pro tunc order," in which it set up specifically and by name the commodity, cement, as one of the low grade commodities that was excepted from the application of the Oklahoma City rate on shipments to Marion.

The so called "nunc pro tunc" proceeding in said judgment or order was meaningless. The law suit to require a refund of the excessive freight charged and collected by appellants could not be turned into "a nunc pro tunc pro-

ceeding" as referred to in a paragraph of the order or judgment. The Commission—Court—had in the preceding paragraph of its judgment specifically found that Authority B-001737-4 did not authorize the rail carriers to charge and collect the Oklahoma City rate on shipments of cement from Ada to Marion, Oklahoma. Such being the case, the Authority, as it stood, clearly showed, as appears from a cursory reading of the Authority, that cement belongs to the class of low grade commodities that was excepted from the application of the Oklahoma City rate.

If, as already held by the Commission, said Authority, as it stood, included cement in the class of low grade commodities that was excepted from taking the Oklahoma City rate, then nothing was gained by having the said authority specifically to name cement as an excepted commodity.

Besides this so called "nunc pro tunc" proceeding was not even mentioned, much less decided, by the Supreme Court of Oklahoma and certainly the judgment of the Supreme Court of Oklahoma, which does not attempt to decide the so called "nunc pro tunc order", may not be reviewed here.

On January 21, 1950, appellee filed an application with the trial court, stating that in view of the fact that the Court in its order and judgment No. 23289 had determined and adjudged that cement was not a commodity that would take or have applied to it the Oklahoma City rate on shipments made from Ada to Marion, Oklahoma, it was the duty of the Court—Commission—to enter judgment against appellants fixing the amount of refund of the excessive freight charged, exacted and collected and requiring the defendants to pay the same into court to be disbursed to the appellee as provided by law.

Pursuant to said application the court on May 15, 1950 entered judgment No. 23659 (Appendix "B' to Petition for Appeal) ordering appellants to refund the amount of

$9,968.47 excessive freight; but the amount should have been $10,539.18, and on May 25, 1950 the court entered its order correcting the former judgment so to read. (Appendix "C" to Petition for Appeal).

An appeal was then taken by appellant to the Supreme Court of Oklahoma which affirmed the judgment of the trial court, and the Supreme Court of Oklahoma found and held as follows (Appendix "D" to Petition for Appeal):

"The Corporation Commission found its Authority No. B-001737-4, issued on April 28, 1941, was an approval of the arrangement between the railroads and the United States Government, and was for the purpose of putting the Oklahoma City rates in force at Marion, with the exception of certain items of low grade commodities, to be used in the construction of buildings and in grading and paving the site. Among those enumerated were sand, gravel, crushed stone, slag, brick and tiles, and the Commission found that the use of the term 'paving' in connection with these other terms in the government-railroad negotiations, included cement, as a necessary ingredient to be used with the sand, gravel and crushed stone. The Corporation Commission therefore found that such authority did not authorize the carriers to charge and collect the Oklahoma City rate on cement shipped from Ada to Marion, Oklahoma."

"The plaintiffs in error complain this is a suit for damages or reparation. The authority of the Commission is determined by 17 O. S. 1941, Sec. 121, which provides:

'The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation . . . charges an amount for any service . . . in excess of the lawful rate in force at the time such charge was made, . . .'

"In St. Louis-S. F. Ry., Co., et al. v. State et al., 155 Okla. 236, 8 P. 2d 744, we held, that the Corporation Commission was without power to award reparations for payments on freight shipments where the charges, when made, were in accordance with the rates therefor fixed by the Corporation Commission. The answer to the jurisdiction question therefore depends upon whether a charge has been made in excess of the fixed rate.

"The fixed rate at the time of the shipments in question was undoubtedly the 12 cent rate contended for by the cement company, unless the same was fixed at a higher rate by authority B-001737-4, supra. This authority was the validation of an agreement made between the United States Government and the railroads in question. Its express purpose as shown by the letter from the railroad to the Chief of the Air Corps was to establish rates which would not exceed the rate to Oklahoma City. Its apparent purpose was to procure a reduction in rates rather than an increase. And, as further shown by the letter to the Air Corps, low grade commodities, such as sand and gravel, crushed stone, slag, or brick and tile, used for construction purposes, were specifically excepted from the order, and they were to continue to move on distance or commodity tariff. This authority was for the purpose of permitting this agreement to take effect. It was not an order fixing rates within the contemplation of Article IX, Sec. 18, Oklahoma Constitution. It contains no findings on which such rate orders are made, as required in Midland Valley R. Co. et al. vs. State, 24 Okla. 817, 104 P 1086. It was not based upon notice, as is required of a general rate order under Art. IX, Sec. 18 Oklahoma Constitution. We therefore conclude it was not a rate fixing order, but a permissive authority to carry out the special wartime agreement made between the Government and the railroads.

"On the other hand the Corporation Commission found that cement was a low grade commodity, such as sand, gravel, crushed stone, slag, brick and tile, and was therefore in the exceptions to Authority B-Q01737-4. That cement is a low grade commodity for shipping purposes appears established.

> 'Cement is a low grade commodity which is usually loaded to the maximum capacity of the cars used.' 87 I. C. C. R. P. T. 462.

"The carriers cite and rely on Application of Central Airlines, Inc., 199 Okla. 300, 185 P 2d 919, as supporting its construction that, 'low grade commodities, such as sand, gravel, crushed stone, slag, brick and tile' limited the low grade commodities to those specifically specified. The case cited construes Section 34, Art. IX of the Oklahoma Constitution, wherein the language, 'the term transportation company shall include' was held limited to the particular ones therein specified. That case is clearly distinguishable from the one at bar."

"It will be noted also that the authority from the Commission does not specifically except such commodities from the agreement, but provides that 'such arrangements *may* be restricted as to shipments of low grade commodities'. Apparently therefore this authority leaves the question of the application of the Oklahoma City rate on such shipments open to the possibility of further agreement between the Government and the railroads.

> "We therefore conclude the Corporation Commission did not err in holding the commodity, cement, was not included in its Authority B-001737-4."

In appealing from the judgment of the Supreme Court of Oklahoma, appellants assign as error: That the Supreme Court of Oklahoma erred in upholding and sustaining the

validity of the statutes of Oklahoma, which appellants call Orders Nos. 23289 of January 19, 1950, 23659 of May 15, 1950, 23681 of May 25, 1950, and in holding that said orders did not confiscate appellants' property without due process of law contrary to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States; and in holding that said orders are not repugnant to Sec. 10 Art. 1, of the Constitution of the United States in that said orders made the applied freight rate retroactive to the dates of the shipments involved, which moved under contracts based on a different rate, which formed the consideration of the shipping contracts, thereby changing and impairing the obligation of executed contracts.

Statute of Oklahoma not Involved

Under Sec. 237 (2) Judicial Code, the Supreme Court is without jurisdiction herein since the orders complained of are judicial in character and are not legislative or statutory.

We quoted above the statute of Oklahoma which constitutes the Corporation Commission a "court of record" to hear and determine causes of this nature.

The Supreme Court of Oklahoma holds, under the statute above referred to, that the Corporation Commission acts as a court of record to determine the amount due where any public service corporation charges an amount for any service rendered in excess of the lawful rate.

> "Said section 1, chapter 10, supra, stripped of its surplus verbiage, and applied to a case of this kind would read:
>
> " 'The Corporation Commission is hereby vested with power of a court of record to determine the amount of refund due where any public service corporation charges an amount for any service rendered in excess of the lawful rate in force at the time such charge was made or that may thereafter be declared to be the

legal rate which should have been charged for such service rendered and to whom the overcharge should be paid.'

Under this section where a rate has been fixed and the public service corporation makes a charge for a service rendered that is in excess of the rate fixed, the Corporation Commission is vested with authority, to compel a refund of such excess charge."

A., T. & S. F. Ry. Co. v. State, 85 Okla. 223, 206 Pac. 236, 241

The Supreme Court of Oklahoma further held, under the statute above referred to, that the Corporation Commission is vested with judicial power within the limits of its lawful jurisdiction, and when a claim for refund of illegal charges is based on the application of the wrong rate, the Corporation Commission has jurisdiction and power to determine whether a different rate than that charged was the legal rate and such power is judicial and not legislative.

"By virtue of Const. art. 9, Sec. 19, and Com. Stat. 1921, Sec. 3470, the Corporation Commission is vested with judicial power within the limits of its lawful jurisdiction, and, where a claim for refund of alleged illegal charges collected in excess of the legal effective rate, by reason of applying the wrong rate, is made before it against a transportation company, its jurisdiction and power to determine whether a different rate than that charged for the particular service was the legal rate effective and applicable at the time of the service is judicial and not legislative, as it does not involve the established rate, but is a determination as to which of two effective rates was applicable." St. L. & S.F. Ry. Co. v State, 116 Okla. 95, 244 P. 440.

The Supreme Court of Oklahoma in making further reference to said statute said:

"The powers conferred by these sections are clearly judicial in nature, and the disbursement of the fund is controlled by the Commission as a judicial body, and

as an incident to its power to enforce its judgments." Crawford vs. Corporation Commission, 184 Okla. 127, 85 P. 2d 288, 290.

In the case at bar the question to be determined by the Corporation Commission, sitting as a court of record, was whether the rate prescribed by the mileage scale of rates governing the shipments from Ada to Marion, Oklahoma or the Oklahoma City rate was the legal rate to be charged and collected on the shipments in question. The trial court and the Supreme Court of Oklahoma both held that the mileage scale of rates constituted the legal rate. Under the authorities above cited the act of the trial court and of the Supreme Court of Oklahoma, in determining that the mileage scale of rates was the legal rate, is "judicial and not legislative."

The validity of the orders, which appellants allege were erroneously sustained by the Supreme Court of Oklahoma, were entered by the Commission while sitting as a Court of record at the trial of this cause. Said orders are judicial in nature and not legislative. The Supreme Court is not authorized to review the judgment of the highest state court sustaining the validity of a judicial order.

Validity of the Orders Attacked Not Presented to the Trial Court

The alleged "federal question" sought to be reviewed here was not presented to the court of first instance as required by Rule 12. The question here raised is the validity of certain orders entered by the Corporation Commission during the course of the trial sitting as a court of record. Under appellants' "Statement of Jurisdiction," it is stated that the federal question was presented and raised before the Corporation Commission by objection to appellee's offer of Exhibit 6 (c.m. 236-37. Included in Tr.), which, showed

the rates on cement shipped from several other points, and did not refer to nor have any connection with the validity of the orders complained of. The objection relied upon (c.m. 36. Included in Tr.) is as follows:

> "We object to the introduction of this exhibit. It goes beyond the complaint and that under the rules of this Commission, that this is an attempt to seek reparation from a rate that has been established by the Commission, therefore the Commission would have no jurisdiction to grant reparation."

Said objection was overruled (c.m. 37. Included in Tr.) Later appellants demurred to the evidence of appellee on the same ground (c.m. 65. Included in Tr.) as follows:

> "We wish to demur to the evidence of the complainant for the reasons we interposed in our objection to the introduction of these exhibits."

The alleged federal question, not having been presented or raised in the trial court, cannot be reviewed here.

> RECORD DOES NOT SHOW: (1) THAT THE ALLEGED FEDERAL QUESTION WAS ACTUALLY DECIDED BY THE SUPREME COURT OF OKLAHOMA: (2) THAT A DECISION BY THE SUPREME COURT OF OKLAHOMA TO THE VALIDITY OF THE ORDERS WAS NECESSARY TO A DETERMINATION OF THE CAUSE: (3) THAT THE JUDGMENT OF THE SUPREME COURT OF OKLAHOMA COULD NOT HAVE BEEN RENDERED WITHOUT DECIDING THE ALLEGED FEDERAL QUESTION.

The Supreme Court of Oklahoma did not discuss, much less attempt to pass upon, the validity of the orders in question. The whole case turned upon the construction to be placed upon Authority B-001737-4. No reference was made by the supreme court of Oklahoma to the so-called nunc pro tunc proceeding or to any order other than Authority B-001737-4. The deciding question was whether cement was included in the exception clause of said Authority B-001737-4 which exempted it as a low grade com-

modity, such as sand, gravel, crushed stone, slag, brick and tile, from taking the Oklahoma City rate. The Supreme Court of Oklahoma on this question said:

> "• • • the Corporation Commission found that cement was a low grade commodity, such as sand, gravel, crushed stone, slag, brick and tile, and was therefore in the exceptions to Authority B-001737-4. That cement is a low grade commodity for shipping purposes appears established."
>
> • • • • • • •
>
> "We therefore conclude the Corporation Commission did not err in holding the commodity, cement, was not included in its Authority B-001737-4."

Having determined from an interpretation of said Authority B-001737-4 that cement was not included in the Authority itself but was included in the exceptions thereto, the entire case was fully and completely adjudicated. In so holding the Supreme Court of Oklahoma adjudged that the application of the Oklahoma City rate to the shipments involved was erroneous and that the lawful rate that should have been applied was that prescribed by the mileage scale of rates on shipments of cement for the distance of Ada to Marion, Oklahoma. In its opinion, the Supreme Court of Oklahoma brushed aside the question as to the validity of the orders attacked by saying, in effect, that it was not necessary to decide that question, in view of the holding that said Authority did not authorize the application of the Oklahoma City rate to the shipments of cement in question. The only thing the Supreme Court of Oklahoma said on that subject was:

> "It is further contended that the decision of the Corporation Commission in 1950, was retroactive and established a rate then which was retroactive to the time the shipments were made some years earlier. The views we have expressed on other points above set out

(which were that the language of Authority B-001737-4 did not authorize the changing the Oklahoma City rate to shipments of cement from Ada to Marion) appears to have fully answered this issue."

Since the alleged federal question was not decided, and was not necessary to be decided, in order to render the judgment that was rendered by the Supreme Court of Oklahoma, the Supreme Court of the United States may not review said judgment.

> "It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it." Southwestern Bell Telephone Company v. Oklahoma, 303 U.S. 206-213, 82 L. Ed. 751; Honeyman v. Hanan, 300 U. S. 14-26, 81 L. Ed. 476; Lynch v. People, 293 U. S. 52-55, 79 L. Ed. 191.

This Appeal is Without Merit

Appellee maintains there is no substantial federal question involved, and, for the reasons hereinabove urged, this Court is without jurisdiction herein.

Wherefore, Appellee prays that this Court refuse to take jurisdiction in this cause, and that the appeal be dismissed or that the judgment of the Supreme Court of Oklahoma be affirmed.

J. H. JARMAN
JOHN JARMAN
Attorneys for Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

No. 304

OKLAHOMA CITY-ADA-ATOKA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (J. M. Kurn and Frank A. Thompson, Trustees),

Appellants,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION, AND OKLAHOMA PORTLAND CEMENT COMPANY,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF APPELLANTS OPPOSING MOTION TO DISMISS OF APPELLEE, OKLAHOMA PORTLAND CEMENT COMPANY.

Appellants file this brief in opposition to Motion of Appellee, Oklahoma Portland Cement Company to Dismiss the Appeal, as provided in Paragraph 3 of Rule 7 of this Court. As neither the State of Oklahoma, nor the Corporation Commission of Oklahoma, have filed anything herein reference in this brief will be to appellee, Oklahoma Portland Cement Company.

The question presented by this appeal is whether the orders of the Corporation Commission of Oklahoma amending a freight rate to apply to shipments long since completed and on which the freight had been paid by appellee

on the basis of the then published and legal rate, by virtue of which orders appellee recovered a monetary judgment against appellants violated appellants' constitutional rights of due process of law and the prohibition against impairment of contract.

The orders of the Corporation Commission of Oklahoma complained of herein were promulgated by it in the exercise of its legislative functions.

The pivotal facts which are undisputed and on which the rights of appellants depend, were omitted from appellee's Motion to Dismiss.

The Corporation Commission of Oklahoma in conjunction with the Interstate Commerce Commission established a mileage scale of rates on cement on February 23, 1924, by its Order No. 2361 (R-299-315). Appellant, Oklahoma City-Ada-Atoka Railway Company was not a party to that proceeding, but subsequently and prior to the movement herein, filed adoption notices of existing Oklahoma tariffs.

By that order the rate on cement from appellee's plant at Ada, Oklahoma to Marion, Oklahoma on appellant's Oklahoma City-Ada-Atoka Railway Company line was 12c p.h.w. and that to Oklahoma City was 13c (R-310).

Said order concluded:

> "*It is further ordered,* That the Commission retain jurisdiction of the subject-matter herein involved and the parties hereto for such further order of orders as may be found necessary.
>
> "*And it is further ordered,* That this order shall continue in force until the further order of this Commission." (R-314-315).

In the early part of February, 1941, when it became known that the Army Air Corps might locate a large in-

stallation near Oklahoma City, great local effort was made to secure such location. As a result the Army selected the site of what is now Tinker Field about 9 miles southeast of Oklahoma City on the line of the appellant, Oklahoma City-Ada-Atoka Railway Company. One of the conditions imposed by the Army was that the Oklahoma City freight rates should apply to shipments to this location, at the station of Marion above referred to. This was agreed to by the different railroads in Oklahoma City, and on February 24, 1941, appellant, Oklahoma City-Ada-Atoka Railway Company wrote to the Air Corps:

> "Further agreed that rates and ratings applicable to this activity will not in any case exceed the net cash rates applicable to Oklahoma City, Oklahoma (where land grant deductions apply) except on low grade commodities such as sand and gravel, crushed stone, slag, or brick and tile used for construction purposes moving on commercial or Government bills of lading which may be handled on distance or commodity tariff." (R-259-260).

To carry out such agreement, on April 22, 1941, the Southwestern Lines, including appellants, petitioned the Oklahoma Corporation Commission for authority to make the following changes:

> "Amend SWL Tariffs 55-Q and 83-G by establishing the following provision under 'General Application of Rates':
>
> "The rates named in this tariff, as amended applicable from or to (as the case may be) Oklahoma City, Okla. will also apply from or to (as the case may be) Marion, Okla. on the O.C.-A-A" (R-272).

And again on April 29, 1941, the railroad's agent requested authority to:

"* * * amend the Application to provide that the proposed Item No. 58 for Mileage Table No. 1-H will not apply on Sand, Gravel, Crushed Stone, Slag, Brick and Tile, also that the proposed provision for Tariff No. 55-Q will not apply on the aforementioned articles" (R-274).

The Corporation Commission of Oklahoma on April 28, 1941 approved such agreement and authorized the publishing of the change of rates contemplated thereby by the Oklahoma City railroads (R-264, 336). This was accomplished by the Corporation Commission issuing its Authority B-001737-4 of that date to the publishing agent of the carriers which provided:

"Oklahoma railroads be and they are hereby authorized to issue, file and make effective, on one day notice to the public and this Commission, necessary tariffs or supplements to tariffs which shall provide for the application at 'Marion,' Oklahoma, a point on the Oklahoma City-Ada-Atoka railroad, of the rates and ratings, whether commodity or mileage, that apply to or from Oklahoma City, Oklahoma, except that such arrangements may be restricted as to shipments of low grade commodities such as sand, gravel, crushed stone, slag, brick and tile on all shipments moving locally between 'Marion' and Oklahoma City.

"All tariffs issued hereunder shall bear reference to this Commission's Authority B-001737-4 of April 28, 1941" (R-266-267).

As a result Supplement No. 5 to Southwestern Lines' Mileage Table No. 1-H, effective May 20, 1941, item No. 58 was published which provided:

"'Rates from or to Oklahoma City, Oklahoma will be protected from or to Marion, Okla., on OC-A-A except that this rule does not apply to or from Okla-

homa City, Okla. (Note—Will not apply on sand, gravel, crushed stone, slag, brick and tile).'" (R-322).

This tariff when published and filed with the Commission changed the rate on cement from Ada to Marion to 13c per hundred pounds, or the Oklahoma City rate. The movement of cement involved herein from Ada to Marion, Oklahoma, on which this Oklahoma City rate was collected began February 7, 1942 and was terminated April 8, 1944, and included 1011 carloads. Appellee admitted that when it made its bid on the cement, it knew that the 13c or Oklahoma City rate "was the published rate" (R-173). Since publication in the various tariffs of a general application of the Oklahoma City rates at Marion was only a temporary measure to provide rates to Marion as speedily as possible, the individual tariffs were later amended by publishing specific rates to Marion based on the rates in effect to Oklahoma City in keeping with the agreement with the War Department (R-193). Accordingly cement rates from Ada, Oklahoma and competitive producing points were published specifically effective July 10, 1941 in Southwestern Lines' Tariff 168-G (R-193-275). The same procedure was followed with reference to interstate rates, and on May 6, 1941, the Oklahoma City rates were made applicable to Marion (R-192).

That the rate paid by appellee was the only published rate is also shown by the complaint originally filed herein in that it at that time sought relief by "reparation" and not by judgment for an overcharge (R-128). In other words, appellee sought to have the rate changed and that it then be given an award for the difference.

By reason of these transactions the 12c or old mileage rate on cement contended for by appellee was eliminated from the tariffs and they were "amended" by the au-

thority of the Corporation Commission, and published to the knowledge of appellee. This established the Oklahoma City rate as the only rate on cement existing at the time of the movement herein.

The first notice the Commission took of this situation was its Order No. 23, 289, dated January 19, 1950 (R-330-349). This Order states at the beginning "This proceeding involves rates assessed on carload shipments of cement, * * *" (R-330). It proceeds to trace the rate history of cement in Oklahoma and justifies its issuance of Authority B-001737-4. It then "finds that Authority No. B-001737-4 * * * should be *amended* to restrict the word 'cement' as a low grade commodity * * *". It then proceeds to set out in full the exception to said authority to include the word cement within the excepted class (R-347). The order is:

> "It Is Therefore, Ordered: That this Commission's Authority No. B-001737-4, issued on April 28, 1941, be and the same is hereby *amended* so as to read" (R-348). (Italic ours).

Then again follows an exact restatement of the Authority but includes the word cement as the first article excepted from the application of the Oklahoma City rate (R-349). This order does not give judgment against any person for anything. It "amends" the Authority under which the rate was published as applied to all railroads. It is not *in personam*, but *in rem*. Further it does not order cement into the exception by reason of judicial construction, but by reason of the power granted under Section 18, Art. IX of the Constitution of Oklahoma that Corporation Commission "may, from time to time alter or amend" rates, charges, classifications, etc.

Authority B-001737-4 amended the cement rate as established in Order 2361, and then the Commission by

Order 23, 289 herein again "amends" Authority B-001737-4. But this time the amendment is made on January 19, 1950, and made to apply on shipments that moved beginning February 7, 1942 to April 28, 1944. The only possible power of the Commission to issue this order "amending" rates is that found under Sec. 18, Art. IX of the Constitution of Oklahoma, authorizing the Commission to prescribe and fix rates and to alter or amend the same. It was a legislative act.

In *City of Poteau* v. *American Indian Oil & Gas Co., et al.*, 159 Okl. 240, 18 P. (2d) 523, the 6th syllabus by the Court is:

> "Corporation Commission, in prescribing rates, and regulations for public utilities, acts only within powers delegated by State Constitution, which are legislative, not judicial."

See also *Western Oklahoma Gas & Fuel Co.* v. *State, et al.*, 113 Okl. 126, 239 Pac. 588, 591; *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co., et al.*, 284 U. S. 370, 386.

In each instance the Commission sought to change existing conditions, that is, to change the published rates on cement from the former mileage basis to Marion to that of Oklahoma City in the Authority as originally issued. Then to change the rates as published under the Authority back to the mileage basis by the amendment of Order 23, 289. This can be only by legislative act.

In *Community Natural Gas Co.* v. *Corporation Commission of Oklahoma, et al.*, 182 Okl. 137, 76 P. (2d) 393, 396, in quoting from *Prentis* v. *A.C.L. Co.*, 211 U. S. 310, it is said:

> "'But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have

taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by §720 (28 U.S.C.A. §379). A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals.'"

The final amendment of Order 23, 289 in January, 1950, to affect rates charged in 1942-1944 would make the rate retroactive. Such power is not granted by the Constitution or statute of Oklahoma to the Corporation Commission. *St. Louis-San Francisco Ry. Co.* v. *State*, 155 Okl. 236, 8 P. (2d) 744.

For the state to establish and fix utility rates, forbid the utility to charge any other rates, and then say that those rates may be declared unjust and unreasonable as applied to executed transactions shocks the conscience. *Michigan Bell Telephone Co.* v. *Michigan Public Service Commission*, 315 Mich. 533, 24 N. W. (2d) 200, 206.

The legislative character of these orders complained of herein is not changed by the so-called court judgment granted in Order 23, 659 (R-356-369). That order again announces in the first paragraph of the order that "this proceeding involves rates assessed on carload shipments of cement, * * *" (R-356).

It further holds:

"The Commission holds that it had the authority to amend Order No. 2361, and that in re-consideration it had the authority to reform said order so as to state the facts as intended by the record at the time of the issuance of said Authority B-001737-4. To the extent that Order No. 23289, *supra*, reforms said Authority No. B-001737-4, said order No. 23289 should be and is hereby reaffirmed and the petition for rehearing, to that extent, should be and is hereby denied." (R-364).

Finally:

"IT IS, THEREFORE, ORDERED: That the petition for re-hearing filed herein by the complainant, to the extent that it asks that Order No. 23289 issued herein on the 19th day of January, 1950, be held null and void is hereby denied.

"IT IS FURTHER ORDERED: That Order No. 23289, issued herein on the 19th day of January, 1950, to the extent that said Order No. 23289 reformed Authority No. B-001737-4 issued April 28, 1941, be and the same is hereby re-affirmed." (R-368).

This order denied appellee's (complainant's) petition for rehearing (R-351-355), which presented the same argument presented here in its Motion to Dismiss herein that the Commission's action was judicial and not legislative.

But it is argued that the Commission in this order entered a "court judgment" requiring appellants to pay $10,538.70 to appellee. All this is claimed to be proper because of 17 O. S. 1941, 121. This section vests the Commission with the power of a court of record to determine "* * * the amount of refund due in all cases where any public service corporation * * * charges an amount for any service * * * in excess of the lawful rate in force at the time such charge was made , * * *." As the lawful, published rate was admittedly the only rate appellants

charged, and was the only rate existing according to the order of the Commission there was no refund due.

By Order 23, 659, the Commission went far beyond the scope of the above statute. It first had to create the basis for a refund, and the statute does not give it the "powers of a court of record" to create a refund. Its only powers in this respect are those of Sec. 18, Art. IX of the Oklahoma Constitution giving it power to prescribe or fix rates and to alter and amend them. The very basis of Order No. 23, 659 is the illegal legislative action of the Commission in creating the basis for a refund by its retroactive amendment to its existing rate Authority.

A utility commission has no authority after a transaction or contract valid when entered into, to thereafter "enact rules, make them retroactive, and order a money award to customer, and its attempt to do so was void for lack of jurisdiction." *Lyons* v. *Otter Trail Power Co.*, 68 N. D. 403, 280 N. W. 192. Furthermore the improper assumption of judicial power by the legislature or its duly authorized rate making agent is repugnant to constitutional provisions guaranteeing due process of law. *State, ex rel Boynton, Atty. Gen., et al.* v. *Public Service Commission of Kansas, et al.*, 135 Kan. 491, 11 P. (2d) 999, 1006.

The third Order or Order No. 23, 681 is merely a correction of the amount found due in Order No. 23, 659 and is based upon the same infirmity.

The foundation of the relief sought by appellee is the change in the rates published under the Authority B-001737-4. Without the retroactive use of its legislative power in amending the Authority, no refund would have existed, and there would have been no amount for the Commission to determine by the use of its powers "of a court of record."

The violation of appellants' constitutional rights was presented to the Supreme Court of Oklahoma, and of necessity passed upon by it.

The violation of appellants' constitutional rights arose from the unwarranted use of its legislative powers by the Corporation Commission of Oklahoma. This created the substantial federal question which was presented to the Supreme Court by the petition in error (R-120-122). While these questions were raised generally in the petition in error, they were raised specifically in paragraphs 4 and 5 thereof, as follows:

> "Orders No. 23, 289 dated January 19, 1950; No. 23, 659 dated May 15, 1950, and No. 23, 681 dated May 25, 1950, collectively and separately deprive the plaintiffs in error, and each of them, of their property without due process of law in violation of the Fifth and Fourteenth Articles of Amendment of the Constitution of the United States, and Section 7, Article II, of the Constitution of the State of Oklahoma.
>
> "Orders No. 23, 289 dated January 19, 1950; No. 23, 659 dated May 15, 1950, and No. 23, 681 dated May 25, 1950, collectively and separately impair the obligation of previously existing contracts in violation of Section 15, Article II of the Constitution of the State of Oklahoma, and Section 10 of Article I of the Constitution of the United States." (R-121-122).

The Oklahoma Supreme Court affirmed the judgment of the Corporation Commission, yet it could not do so without affirming or adopting the basis upon which the judgment was arrived at. That is, the judgment could not have been secured without the Corporation Commission in its legislative capacity amending the published rate and applying such amended rate retroactively to these shipments which had been completed on the existing published rate. The Oklahoma Supreme Court recognizes this position by stating:

"It is further contended that the decision of the Corporation Commission in 1950, was retroactive and established a rate then which was retroactive to the time the shipments were made some years earlier. The views we have expressed on the other points above set out appear to have fully answered this issue" (R-399).

While there is no other direct statement in the opinion specifically mentioning in so many words that it denies the violation of appellants' constitutional rights as set up in the petition of error, yet the entire opinion is necessarily based on the proposition that the Commission could lawfully do what it did do in amending Authority B-001737-4 in order that cement could be included within the exception to the application of the Oklahoma City rates to Marion, and that this change in the exception with the consequent change in the rate based thereon could be made by the Commission when it did after the movement of the commodity. That is the underlying principle of the orders of the Commission approved by the Supreme Court.

Dorchy v. *Kansas,* 272 U. S. 306, 308-9 in determining that such constitutional questions properly raised in the state Supreme Court must be passed upon by the Supreme Court of the United States, said:

"The state court did not, in either of its opinions, mention the specific objection to the validity of s 19 now urged.

* * * * * * *

"Nor was this question referred to, in any way. But the claims made by Dorchy below properly raised it; and, as the judgment entered involves a denial of the claims, we must pass upon it."

See also *Schuylkill Trust Company* v. *Commonwealth of Pennsylvania,* 296 U. S. 113, 122-123; *Fox River Paper Co.*

v. *Railroad Commission of Wisconsin*, 274 U. S. 651, 653; *Ward, et al.* v. *Love County, Oklahoma*, 253 U. S. 17, 22.

Although appellee argues that the opinion can be sustained on non-federal grounds, in view of the federal questions having been specifically raised in the Oklahoma Supreme Court, and the necessity of the consideration as essentially underlying the decision of that court, this Court will still assume jurisdiction. In *Lawrence, et al.* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282, it is said:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided.
>
> * * * * * * *
>
> "If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, see *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 508, 512, *et seq.*, 61 L. ed. 1280, 1285, 1287, 37 S. Ct. 673, Ann. Cas. 1917E, 88; *Smith* v. *Cahoon*, 283 U. S. 553, 564, 75 L. ed. 1264, 1272, 51 S. Ct. 582, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked."

See also *Davis* v. *Wechsler*, 263 U. S. 22, 24.

In view of this state of the record and the impossibility of the Supreme Court of Oklahoma rendering its

decision without impairing appellants' constitutional rights, whether it expressly passed on them or not, the Motion of Appellee to Dismiss should be denied. In *Chicago Life Insurance Company* v. *Needles*, 113 U. S. 574, it is said:

> "The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the Auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated because it may appear, upon examination of this federal question, that the Statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied."

To the same effect is *The Bell's Gap Railroad Co.* v. *Commonwealth of Pennsylvania*, 134 U. S. 232; *Chapman* v. *Goodnow's Adm'r.*, 123 U. S. 540, 548; *International Harvester Co. of America* v. *State of Missouri, ex rel.*, 234 U. S. 199, 206-207.

Appellee's argument that there is no federal question raised in the opinion because the Supreme Court of Oklahoma did not discuss or pass on the validity of the orders of the Corporation Commission, is no ground to

dismiss this appeal. The opinion or judgment of the Supreme Court would itself supply such basis of the claim by appellants of a denial of their federal rights. Such denial by that court is sufficient to give this Court jurisdiction. *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, 320.

The Oklahoma Supreme Court by its own construction changed or amended the Authority issued by the Corporation Commission to include cement among the excepted items. This was essential to reduce the rate from that published by the Southwestern Lines' in consequence of the Authority from the Oklahoma City rate to the mileage rate to Marion. The judgment cannot exist without this change in the rate by this method. We then have by judicial construction of the Supreme Court of Oklahoma an amendment to the legislative act of the Corporation Commission in establishing rates. The result of this construction is the taking $10,538.70 as freight charges on completed cement shipments with interest at six per cent from April 8, 1944, from these appellants in violation of their federal rights, which is sufficient to permit this Court to take jurisdiction of this appeal. *Brinkerhoff-Ferris Trust & Savings Co.* v. *Hill, supra.*

The Motion to Dismiss should be denied for the further reason, that since the action of the Commission and its approval by the Supreme Court of Oklahoma alter the consideration of completed shipping contracts, the obligation of such contracts is impaired. In such cases this Court will independently determine whether the obligation of such contracts has been impaired and the meaning and application of state constitutional or statutory (or its equivalent) provisions asserted to impair such contracts. *Coombes* v. *Getz,* 285 U. S. 434, 441.

The federal question was raised before the Corporation Commission.

While no claim is made that the federal questions were not raised in the Supreme Court of Oklahoma, it is contended they were not raised before the Commission, as a trial court.

This contention overlooks the limitation placed upon the Commission by the Section 34, Art. IX as amended of the Constitution of Oklahoma that all provisions of the Constitution dealing with the Corporation Commission which would also include all proceedings thereunder must not conflict with any provisions of the Constitution of the United States. Such section provides:

> "The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

While such section would make the raising of the federal questions arising from the violation of the constitutional guaranties unnecessary before the Commission, such questions were called to the attention of the Commission by the objection to the introduction of evidence and the demurrer at the close of appellee's case for the reason that the Commission did not have jurisdiction to grant a reparation (R-146-175). Jurisdiction in a particular case is not only power to hear and determine, but also includes the power to render the particular judgment entered. *In re Harkness' Estate,* 83 Okl. 107, 204 Pac. 911.

If the Commission did not have power of jurisdiction to enter the requested order, its entry is a d e n i a l of the constitutional rights of the party against whom the order is directed. Due process of law means the enforce-

ment of a right or the prevention of wrong before a legally constituted tribunal have jurisdiction over the class of cases to which the one in question belongs with notice to the party, with an opportunity to appear and be heard. *Grable* v. *Childers*, 176 Okl. 360, 56 P. (2d) 357; *Oklahoma Gas & Electric Co., et al.* v. *Wilson & Co., Inc., et al.*, 146 Okl. 272, 288 Pac. 316. The objections to the introduction of evidence and demurrer to the evidence thus raising the lack of jurisdiction of the Commission included the objection on constitutional grounds. Also such general demurrer is sufficient "to raise the issue of constitutionality of a statute upon which remedy sought in petition is based." *Wright* v. *State*, 192 Okl. 493, 137 P. (2d) 796.

The federal questions presented in this appeal were thus first raised during the hearing before the Corporation Commission, then in the Petition in Error filed in the Supreme Court of Oklahoma initiating the appeal from the Commission to that Court, and finally in the Petition for Rehearing before the Supreme Court of Oklahoma (R-403).

In *International Harvester Company of America* v. *State of Missouri, ex rel.*, 234 U. S. 199, 206-207, it is held that a motion to dismiss should be denied although the federal questions were first raised by exceptions to the report of a special commissioner to whom an original proceeding in the highest state court had been referred to take evidence and report his conclusions, although the highest state court did not refer to the federal questions in its opinion, and although that court has laid down the rule that constitutional questions must be raised at the first opportunity.

The federal questions were thus constantly raised before the Corporation Commission both by virtue of the Constitutional provisions and the procedure of appellants.

Whether it be by amendment of the rate by the Corporation Commission or by the construction of the Commission orders by the Oklahoma Supreme Court, appellants' constitutional rights were destroyed.

It is not denied that the charges paid by appellee for the movement of the shipments involved were the charges published in the existing tariffs. These were the only charges appellants could collect, and 17 O. S. 1941, 121, does not empower the Corporation Commission to determine the amount of refund due when the legal rate so published is collected.

In *St. Louis-San Francisco Ry. Co., et al.* v. *State, et al.*, 155 Okl. 236, 8 P. (2d) 744, the syllabus is:

> "The corporation commission is not empowered to award reparations for payments on freight shipments, where the charges, when made, were in accordance with the rates therefor, fixed by the corporation commission."

In this opinion 17 O. S. 1941, 121, is quoted and held inapplicable.

Until such published rate has been changed by the Corporation Commission in accordance with its powers, the shipper cannot pay less, nor can the railroads subject to the tariffs collect less on future shipments. Such subsequent change in the rate by the Corporation Commission although delayed would not make the prior published charges illegal or unreasonable. *Purcell* v. *N.Y.C.R. Co.*, 268 N. Y. 164, 197 N. E. 182, 184; *Woodrich* v. *Northern Pac. Ry. Co.*, (CCA 8), 71 F. (2d) 732, 734; *El Paso & S.W.R. Co.* v. *Arizona Corporation Commission*, 51 F. (2d) 573, 576-77.

The published legal rate is the only rate that can be paid or charged even though it was not approved by an order of the Corporation Commission and was not what it intended. *T. R. Miller Mill Co.* v. *L. & N. R. Co.*, 207 Ala.

253, 92 So. 797. Such rate filed, approved and published is the lawful rate even though unreasonable, as it is the only rate which the carrier can charge and the shipper is not entitled to recover any excess. *El Paso & S.W.R. Co.* v. *Arizona Corporation Commission, supra.*

These cases and the facts in the instant case clearly distinguish this case from those cited in the Motion to Dismiss. The three cases there relied upon are *A. T. & S. F. Ry. Co.* v. *State,* 85 Okl. 223, 206 Pac. 236, 241; *S. L. & S. F. Ry. Co.* v. *State,* 116 Okl. 95, 244 Pac. 440; and *Crawford* v. *Corporation Commission,* 184 Okl. 127, 95 P. (2d) 288, 290. In each of these cases there was a rate published and in effect, yet the utilities charged and collected a different rate which was not the published or existing tariffs. In each the amount of the refund was determined and 17 O. S. 1941, 121 easily and properly applied.

But those are not the facts here. Since the rate "fixed" by the Commission was charged it had to fix another lower rate, so the Commission amended the rate making it retroactive to create "an overcharge." It thus exceeded its powers of rate making, which are limited to prospective orders only. *St. Louis-San Francisco Ry. Co.* v. *State, supra; Michigan Bell Telephone Co.* v. *Michigan Public Service Commission, supra.*

Charging an amount in excess of the published or legal rate constitutes an overcharge, authorizing a refund under 17 O. S. 1941, 121. Collecting the published legal rate and then later being faced with a claim that some other rate should have been charged is not an overcharge and not within the purview of that statute. This difference is completely ignored by the Supreme Court of Oklahoma, and appellee in its Motion to Dismiss. The Corporation Commission has power to compute the amount of an overcharge,

and enter a judgment for its payment, but it does not have such power to order a repayment of freight charges when the published legal rate has been collected, but a lower rate is subsequently ordered by the Commission. That is a taking of property without due process of law and an impairment of an executed contract.

This Court has been diligent in assuming jurisdiction to protect vested property rights from destruction, and to prevent the impairment of executed contract from retroactive legislation or judicial construction. *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall 450; *Osborn* v. *Nicholson*, 13 Wall 654; *Ettor* v. *Tacoma*, 228 U. S. 148; *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 678-680.

CONCLUSION.

The foregoing answers the points in appellee's motion. Other substantial questions involved are set forth in appellants' jurisdictional statement. Further argument or analysis of the record properly await the hearing on the merits.

The case is within the appellate jurisdiction of this Court. It presents substantial federal questions properly raised and decided by both the Corporation Commission and the Supreme Court of Oklahoma.

Appellee's motion to dismiss should be denied.

Respectfully submitted,

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